Supreme Court, U.S.
FILED
FEB - 1 1993
OFFICE OF THE CLERK

92-1286

No. _____

In The

Supreme Court of the United States

October Term, 1992

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA,

Petitioner,

v.

WOODS PETROLEUM CORPORATION, UNITED STATES OF AMERICA; DEPARTMENT OF THE INTERIOR; ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS; SUPERINTENDENT, CONCHO INDIAN AGENCY, BUREAU OF INDIAN AFFAIRS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

YVONNE T. KNIGHT
Counsel of Record
PATRICE KUNESH
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Petitioner Cheyenne-Arapaho Tribes of Oklahoma

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a tribal oil and gas lease clause, which provides that the lease will continue in force indefinitely beyond its fixed primary term if drilling is commenced by the end of that term, conflicts with §1 of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §396a, which authorizes such leases "for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities"?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW..... 2

JURISDICTIONAL STATEMENT 3

STATUTE TO BE CONSTRUED..... 3

STATEMENT OF THE CASE..... 4

A. Factual Background..... 4

B. Proceedings Below.....7

REASONS FOR GRANTING THE WRIT 10

I. THE QUESTION PRESENTED IS ONE OF FIRST IMPRESSION WHICH INVOLVES THE CONSTRUCTION OF §396a OF THE INDIAN MINERAL LEASING ACT OF 1938 AND WHICH IMPACTS THE VALIDITY OF PROPOSED REGULATIONS UNDER THIS STATUTE.....10

II. THE DISTRICT COURT'S CONSTRUCTION OF §396a NULLIFIES CONGRESS' INTENT THAT TRIBAL MINERAL LEASES SPECIFY A TERM OF YEARS WITHIN WHICH PRODUCTION MUST OCCUR AND CONTRAVENES THE FUNDAMENTAL PRINCIPLE OF INDIAN LAW THAT TRIBAL PROPERTY MAY NOT BE CONVEYED WITHOUT EXPRESS AUTHORIZATION FROM CONGRESS..... 12

A. The Legislative And Administrative History of §396a Demonstrate Congress' Intent That Tribal Mineral Leases Expire Unless Production Is Achieved Before The End Of The Primary Term 12

TABLE OF CONTENTS – Continued

Page

B. The District Court's Decision Nullifies Congress' Intent That Tribal Mineral Leases Expire At The End Of Their Primary Terms Unless Production In Paying Quantities Occurs Within That Period 16

III. NOTWITHSTANDING THE LACK OF A TENTH CIRCUIT DECISION, IT IS APPROPRIATE FOR THIS COURT TO RULE ON THE QUESTION PRESENTED 20

CONCLUSION 22

APPENDIX

Decisions

Order, United States Court of Appeals for the Tenth Circuit, denying Cheyenne-Arapaho Tribes of Oklahoma's petition for rehearing and denying Woods Petroleum Corporation's petition for rehearing with suggestion for rehearing en banc, filed November 2, 1992 ..... App. 1

Opinion, United States Court of Appeals for the Tenth Circuit, affirming, in part, the district court's order of May 26, 1989, filed June 5, 1992 ... App. 3

Order, United States District Court for the Western District of Oklahoma, CIV-84-1765-A, filed May 26, 1989 ..... App. 23

Statutory and Regulatory Provisions

25 U.S.C. §396a ..... App. 74

25 C.F.R. §171.10 (1976) ..... App. 74

TABLE OF CONTENTS – Continued

Page

Proposed Regulation

56 Fed. Reg. 58740-41, November 21, 1991. App. 75

Lease

Oil and Gas Mining Lease No. 14-20-205-6896 – Tribal Indian Lands (Township 14 North, Range 20 West Section 32: NW/4, dated April 2, 1976), approved by Bureau of Indian Affairs, Concho Agency, on May 10, 1976..... App. 76

Miscellaneous

Diagram of Communitized/Production Units – Sections 29 and 32.....App. 88

TABLE OF AUTHORITIES

Page

CASES

California v. Cabazon Band of Mission Indians, 471 U.S. 759 (1985) 11

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 11

Eisen v. Carlisle & Jacquelin, 417 U.S. 15 (1974) 21

Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985) 11, 16

Moncrief v. Pasotex, 280 F.2d 235 (10th Cir.), *cert. denied*, 364 U.S. 912 (1960) 17, 18

Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) 11

Morton v. Mancari, 417 U.S. 535 (1974) 16

New York Transit Authority v. Beazer, 440 U.S. 568 (1979) 21

Northcross v. Board of Education, 412 U.S. 427 (1973) 21

Smith v. McCullough, 270 U.S. 456 (1926) 19

Taylor v. McKeithen, 407 U.S. 191 (1972) 21

United States v. Noble, 237 U.S. 74 (1915) 19

Virginian Ry. Co. v. United States, 272 U.S. 658 (1926) 21

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) 13

SUPREME COURT RULE

Sup.Ct.R. 13.4 3

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES STATUTES

25 U.S.C. §177 19

25 U.S.C. §§396a-g ..... *passim*

25 U.S.C. §397 13

25 U.S.C. §398 13

25 U.S.C. §§461-476 16

25 U.S.C. §503 4

28 U.S.C. §§1253 and 1254(1) 3

28 U.S.C. §1292(b) 2, 9

25 U.S.C. §2101 19

30 U.S.C. §226 20

Act of May 27, 1908, 35 Stat. 312 18

Act of August 8, 1946, 60 Stat. 950 20

FEDERAL RULES AND REGULATIONS

25 C.F.R. §171.10 (1971) 15

25 C.F.R. §186.10 (1938) 14, 15

25 C.F.R. §211.10 (1991) 12, 15

30 C.F.R. Ch. II 12

43 C.F.R. Part 3160 12

TABLE OF AUTHORITIES – Continued

Page

EXECUTIVE MATERIALS

I *Opinions of the Solicitor, Dept. of the Interior* (April 19, 1934) 15

58 I.D. 12 (1942) 15

64 I.D. 49 (1957) 15

80 I.D. 786 (1973) 15

LEGISLATIVE MATERIALS

65 Cong. Rec. 5492 (April 3, 1924) 13

65 Cong. Rec. 8597 (May 15, 1924) 13, 14

18 Fed. Reg. 4291 (July 23, 1953) 15

56 Fed. Reg. 58734 (1991) 11

H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938) 16

S. Rep. No. 985 Cong., 1st Sess. (1937) 16

S. Rep. 97-472, 97th Cong. 2d Sess. (June 10, 1982) 19

TREATISES

F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 13

A. McLane, *Oil and Gas Leasing on Indian Lands* (1955) 15

2 E.O. Kuntz, *A Treatise On The Law Of Oil And Gas* (1964) 5

Mills and Willingham, *Law of Oil and Gas* (1926) 14

2 W.C. Summers, *The Law of Oil and Gas* (1959) ...5, 14

No. _____

In The

Supreme Court of the United States

October Term, 1992

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA,

Petitioner,

v.

WOODS PETROLEUM CORPORATION, UNITED STATES OF AMERICA; DEPARTMENT OF THE INTERIOR; ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS; SUPERINTENDENT, CONCHO INDIAN AGENCY, BUREAU OF INDIAN AFFAIRS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, the Cheyenne-Arapaho Tribes of Oklahoma, respectfully prays that a Writ of Certiorari issue to the United States Court of Appeal for the Tenth Circuit for the purpose of reviewing the question presented by this petition, which was left unresolved by the Court of Appeals.

OPINIONS BELOW

A. The May 26, 1989, memorandum opinion of the United States District Court for the Western District of Oklahoma (Alley, W.E.), CIV-84-1765-A, has not been reported. It is reprinted in the Appendix at 23-73. While the district court entered judgment on a number of questions, this petition presents only the question of whether a specific clause in the tribal mineral leases violates the Indian Mineral Leasing Act of 1938. The part of the district court's judgment and opinion concerning this question is reprinted in the Appendix at 63-69. The district court *sua sponte* certified its order for interlocutory appeal pursuant to 28 U.S.C. §1292(b).

B. The June 5, 1992, judgment and opinion of the United States Court of Appeals for the Tenth Circuit is reported at 966 F.2d 583, and is reprinted in the Appendix at 3-22. In its judgment and opinion, the Tenth Court affirmed the judgment of the United States District Court for the Western District of Oklahoma granting the Tribe's motion for partial summary judgment on the question of whether the Secretary's approval of communitization agreements was arbitrary and capricious, and therefore, ineffective to extend the life of the three leases on which no drilling had occurred. However, the Tenth Circuit neither affirmed nor reversed the district court's judgment on the question presented by this petition, although the question was fully briefed and argued as a cross-appeal.

JURISDICTIONAL STATEMENT

On May 26, 1989, the United States District Court for the Western District of Oklahoma entered a judgment and opinion on the question presented in this petition, as well as on other questions not involved in this petition.

On June 5, 1992, the Court of Appeals for the Tenth Circuit entered a judgment and opinion affirming, in part, the May 26, 1989, decision of the United States District Court for the Western District of Oklahoma; however, no judgment or opinion was entered on the question presented.

On November 2, 1992, the Tenth Circuit denied the Tribe's petition for rehearing on the question presented.

This Court has jurisdiction to review the question presented under 28 U.S.C. §§1253 and 1254(1); Sup.Ct.R. 13.4.

STATUTE TO BE CONSTRUED

Section 1 of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §396a, 52 Stat. 347.

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long

thereafter as minerals are produced in paying quantities.

STATEMENT OF THE CASE

A. Factual Background.

This is an action by the Cheyenne-Arapaho Tribes of Oklahoma[1] (hereinafter "Tribe"), seeking an order that four tribal oil and gas leases expired on May 10, 1981, at the end of their primary terms, for failure to produce in paying quantities as required by the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§396a-g, 52 Stat. 347 (hereinafter the "MLA"). The facts, the nature of the Tribe's claims, and the history of the proceedings are set forth in the prior decisions of the district court and the Tenth Circuit (reproduced in the Appendix) and are summarized below.

The Tribe owns six 160-acre tracts of land located in sections 29 and 32 in Custer County, Oklahoma. *See* Diagram, App. at 88. This land is held in trust by the United States for the benefit of the Tribe. Four of these tracts were separately leased to respondent Woods Petroleum Corporation (hereinafter "Woods") for the purpose of oil and gas production. Three of the leases do not have wells

---

[1] The Cheyenne-Arapaho Tribes of Oklahoma is a federally recognized tribe organized under a constitution and by-laws approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. §503, with a governing body called the Cheyenne-Arapaho Business Committee, which is authorized to enter into oil and gas leases on the Tribe's behalf.

drilled upon them (hereinafter "non-drilling leases").[2] The fourth lease[3] is the site of the well for the section 32 production unit (hereinafter "drilling lease").[4] On May 10, 1976, the Secretary of the Interior (hereinafter "Secretary"),[5] pursuant to his authority under the MLA, approved these four tribal leases with Woods (hereinafter "Woods leases").

Each of the Woods leases contains a "habendum clause",[6] which fixes a primary term of 5 years, ending May 10, 1981, providing that the lease will expire automatically at the end of the 5-year primary term if, by then, there is no well producing in paying quantities on

---

[2] These leases include number 14-20-205-6897, covering the southeast quarter of Section 32-14N-20W; lease number 14-20-205-6895, covering the northeast quarter of Section 32-14N-20W; and lease number 14-20-205-6894, covering the southwest quarter of Section 29-14N-20W.

[3] The fourth lease is number 14-20-205-6896, covering the northwest quarter in Section 32-14N-20W.

[4] Another oil and gas company, Reading and Bates Petroleum Co., is the lessee of the fifth and sixth tribal leases in sections 29 and 32. The fifth tribal lease, number 14-20-205-7672, covering the northeast quarter in Section 29-14N-20W, is the well site for the section 29 production unit. These tribal leases are not at issue in the present case.

[5] In the lower court decisions, the term "Secretary" generally refers to the Secretary of the Interior and his authorized representatives, including the Acting Area Director.

[6] Under principles of oil and gas law, the clause in a lease which describes "the duration of the interest granted" is known as the habendum clause. 2 E.O. Kuntz, *A Treatise On The Law Of Oil And Gas*, §26.1 at 240 (1964); 2 W.C. Summers, *The Law of Oil and Gas*, §§281-283 at 179 (1959).

the leasehold. Each lease also contains a "commence drilling" clause, which, as construed by the district court, provides that the lease will expire automatically at the end of the 5-year primary term if, by then, there is no well commenced on the leasehold. Thus a conflict exists between the habendum clause and the commence drilling clause. Each lease further contains a clause allowing the lease to be made subject to a communitization agreement[7] approved by the Secretary pursuant to §4 of the MLA, 25 U.S.C. §396d.[8]

---

[7] Generally, communitization agreements pool a lease with other leases into one production unit for the purposes of maximizing development of the mineral resources, and apportioning among all the leases in the unit the costs and revenues of the unit well(s). Communitizing leases into production units would continue the non-drilling leases in force beyond their primary terms by virtue of the doctrine of constructive drilling, such that actual drilling on any of the leases within the production unit is deemed to be actual drilling on the non-drilling leases.

[8] Before the expiration of the leases, Woods sought to communitize all lease interests, both Indian and non-Indian, in the section 29 and 32 production units. In April, 1981, Woods endeavored to obtain the Tribe's consent to and the Secretary's approval of these communitization agreements. The Tribe indicated that it would consent to the proposed agreements if the oil companies would renegotiate the Woods leases commensurate with the escalated oil and gas market during the "boom period" then existing in the area. The oil companies rejected the Tribe's request to renegotiate, and presented the Tribe with an ultimatum to "sign [the communitization agreements] by May 6, or face litigation". App. at 27. On May 8, 1981, notwithstanding the Tribe's opposition, the Secretary approved the communitization agreements, without having considered the escalated market value and the marketability of the leases.

On May 6, 1981, only four days before the expiration of the leases, Woods commenced drilling a well in section 32, but had not achieved production in paying quantities by the expiration of the Woods leases, May 10, 1981. Neither had production in paying quantities been achieved by the unit well in section 29 by that date. App. at 26.

B. Proceedings Below.

On July 14, 1984, the Tribe filed suit in the district court against the Secretary and Woods seeking a ruling that the Woods leases expired on May 10, 1981 – the end of their 5-year primary terms. In its suit, the Tribe raised, *inter alia*, two issues: (1) whether the Secretary's approval of communitization agreements was arbitrary and capricious, and therefore, ineffective to extend the life of the three non-drilling leases (the "secretarial authority issue"); and (2) whether the commence drilling clause conflicts with §1 of the MLA, 25 U.S.C. §396a, thereby causing the Woods leases to expire for failure to achieve production in paying quantities by the end of their primary terms (the "MLA issue").

The secretarial authority issue impacts only the three non-drilling Woods leases. The Tribe argued that the Secretary's approval of two communitization agreements must be set aside as arbitrary and capricious, and, consequently, those agreements were ineffective to continue the non-drilling leases in force beyond their primary

terms.[9] The district court granted the Tribe's summary judgment motion on the secretarial authority issue. As summarized by the district court:

> [T]he result of these rulings is that the three leases on which no drilling occurred during their primary terms . . . expired on May 10, 1981, at the end of their primary terms.

App. at 72.

The MLA issue impacts all four Woods leases. The Tribe argued that the commence drilling clause in the Woods leases purports to extend the life of the lease indefinitely if the lessee commences to drill a well by the end of the primary term, and therefore, that clause conflicts with §396a of the MLA, which requires that a well achieve production in paying quantities before the end of the primary term in order to extend the life of the lease. The Tribe argued that this conflict rendered the commence drilling clause ineffective. Therefore, the habendum clause in the Woods leases, which complies with §396a, controls the duration of the Woods leases. Thus, those leases expired at the end of their primary terms for

---

[9] Generally, a non-drilling lease may be extended beyond the end of its primary term by being communitized with other leases in a production unit containing a drilling well. By express provision of the communitization agreement, the unit well is constructively deemed to be drilling on all non-drilling leases communitized in the unit. However, a drilling lease, as the site of an actual drilling well, is extended beyond the end of its primary term in accordance with the provision of the lease itself. A drilling lease therefore is not dependent upon the applicability of a valid communitization agreement for its continued effectiveness beyond the fixed primary term.

failure to produce in paying quantities. The district court denied the Tribe's summary judgment motion on the MLA issue. App. at 71-72, and discussion at 63-69.

The district court certified both of the above discussed issues for interlocutory appeal pursuant to 28 U.S.C. §1292(b).[10] On June 5, 1992, the Tenth Circuit entered its judgment affirming the district court's order on the secretarial authority issue:

> Because the Secretary abused his discretion, the communitization agreements are not valid, and the leases upon which drilling had not commenced as of May 10, 1981, expired on that date. *Accordingly, the order of the district court granting summary judgment to the Tribe is* ***AFFIRMED***.

App. at 22 (emphasis added).[11]

However, the Tenth Circuit's decision neither affirmed nor reversed the district court's order denying the Tribe's motion for summary judgment on the MLA issue. Thus, notwithstanding the Tenth Circuit's explicit recognition of the MLA issue raised by the Tribe's cross-

---

[10] By order of July 24, 1989, the Tenth Circuit granted Woods' petition for permission to appeal the secretarial authority issue. And by order of October 23, 1989, the Tenth Circuit granted the Tribe's petition for permission to appeal the MLA issue stating: "This appeal will be treated as a Cross-Appeal to the appeal of Woods."

[11] Woods' petition for rehearing and suggestion for rehearing *en banc* as to this decision was denied by the Tenth Circuit on November 2, 1992. Woods filed its Petition for a Writ of Certiorari in the United States Supreme Court on December 10, 1992. App. at 1-2.

appeal, App. at 11,[12] its decision does not resolve the MLA issue and leaves the validity of the fourth drilling lease in question. This lease is reprinted in the Appendix at 76-87.

The Tribe petitioned the Tenth Circuit for a rehearing on the grounds that it failed to resolve the Tribe's cross-appeal on the MLA issue by incorrectly concluding that its June 5, 1992, ruling "effectively dispose[d] of this action." App. at 11. However, the Tribe's petition for rehearing was denied without opinion on November 2, 1992. App. at 1-2.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION PRESENTED IS ONE OF FIRST IMPRESSION WHICH INVOLVES THE CONSTRUCTION OF §396a OF THE INDIAN MINERAL LEASING ACT OF 1938 AND WHICH IMPACTS THE VALIDITY OF PROPOSED REGULATIONS UNDER THIS STATUTE.

This Court should grant the Tribe's petition because it presents a question of first impression, namely, whether a lease provision, which authorizes the extension of a tribal mineral lease beyond a term of years specified in the lease by the commencement of drilling rather than by

---

[12] The Tenth Circuit stated: "In addition, the Tribe claims that all four leases expired for failure to achieve production in paying quantities before the end of the primary term because the commence drilling clause is in conflict with the MLA and thus, unlawful."

the achievement of production in paying quantities, conflicts with §396a of the Indian Mineral Leasing Act of 1938. This question requires the construction of the MLA, an important federal statute governing the manner in which the mineral resources of Indian tribes may be leased. This Court has previously construed this statute in other contexts. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *California v. Cabazon Band of Mission Indians*, 471 U.S. 759 (1985); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985).

In addition, regulations are currently proposed pursuant to the MLA which would perpetuate the erroneous decision of the district court on the question presented herein. On November 21, 1991, the Secretary published proposed regulations expressly approving the inclusion of a commence drilling clause in tribal mineral leases for the first time since the MLA was enacted. *See* 56 Fed. Reg. 58734 (1991), especially, proposed §211.27(b), 56 Fed. Reg. at 58735. To date, it appears that only tribal leases in Oklahoma contained commence drilling clauses.[13] The Secretary now proposes to approve their inclusion in tribal leases nationally. This Court should accept review of the issue presented herein to provide the Secretary with guidance concerning the propriety of such clauses in tribal leases governed by §396a of the MLA.

---

[13] *See* "Brief In Support Of Tribe's Cross Motion For Partial Summary Judgment On The Issue Of Whether The Woods Leases Violate The Indian Mineral Leasing Act Of 1938", n.3 and exhibits 1-11 attached thereto, dated September 18, 1987.

II. THE DISTRICT COURT'S CONSTRUCTION OF §396a NULLIFIES CONGRESS' INTENT THAT TRIBAL MINERAL LEASES SPECIFY A TERM OF YEARS WITHIN WHICH PRODUCTION MUST OCCUR AND CONTRAVENES THE FUNDAMENTAL PRINCIPLE OF INDIAN LAW THAT TRIBAL PROPERTY MAY NOT BE CONVEYED WITHOUT EXPRESS AUTHORIZATION FROM CONGRESS.

A. The Legislative And Administrative History of §396a Demonstrate Congress' Intent That Tribal Mineral Leases Expire Unless Production Is Achieved Before The End Of The Primary Term.

The leasing of minerals located on tribal lands is controlled by the MLA and its comprehensive implementing regulations. 25 U.S.C. §§396a-g; 25 C.F.R. Part 211; 30 C.F.R. Ch. II; 43 C.F.R. Part 3160. Section 396a of the MLA establishes the durational restrictions applicable to tribal mineral leases:

> [L]ands owned by any tribe . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, *for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.*

App. at 74 (emphasis added). The question presented by this petition is whether the commence drilling clause of the Woods leases violates the durational restrictions on tribal leases mandated by §396a.

The legislative and administrative history of §396a demonstrate Congress' intent to establish a leasing

scheme under which tribes would prescribe the primary terms of their mineral leases, on a lease-by-lease basis, and under which a lessee would be required to achieve production in paying quantities before the end of the fixed period or lose the lease. Since Congress' intent "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them", *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979), it is appropriate to examine the "common notions of the day" as to the meaning of §396a.

The durational restrictions imposed on tribal mineral leases by §396a replicate those adopted in the Mineral Leasing Act of 1924 (hereinafter the "1924 Act")[14] in which Congress provided that:

> Unallotted land . . . may be leased . . . by the Secretary of the Interior, with the consent of the [tribe] for oil and gas mining purposes for *a period of not to exceed ten years*, and as much longer as oil or gas shall be found in paying quantities. . . .

Act of May 29, 1924, 43 Stat. 244, *codified at* 25 U.S.C. §398 (emphasis added). In adopting the 1924 Act, Congress intended to authorize tribal leases "on the same terms as [private sector leases], which means for 10 years or as long thereafter as oil can be found in paying quantities." 65 *Cong. Rec.* 8597 (May 15, 1924) and 65 *Cong. Rec.* 5492

---

[14] Prior to 1924, tribal lands could be leased for oil and gas mining purposes for fixed ten year periods under the Act of February 28, 1891, 26 Stat. 794 (*codified at* 25 U.S.C. §397). *See also* F. Cohen, *Handbook of Federal Indian Law*, 533-536 (1982 ed.).

(April 3, 1924). During this period, basic oil and gas law applicable to private sector leases held that "where a lease provides that it shall continue for a definite term of years and as long thereafter as oil is . . . produced, . . . to continue the lease beyond the definite term the lessee must actually find and produce oil or gas in paying quantities during the definite term." 2 W.C. Summers, *The Law of Oil and Gas* §293 at 202 (1959) (noting that the "thereafter" clause "refers to the end of the *definite* term.").

The regulations implementing the 1924 Act and the MLA also confirm that Congress intended to authorize tribal oil and gas leases with *definite* primary terms within which production in paying quantities must be achieved in order to continue the leases in force beyond the end of the fixed term. The regulations implementing the 1924 Act provided:

> Oil and gas leases shall be for a term of *five years* and as long thereafter as oil or gas is found in paying quantities. . . .

65 *Cong. Rec.* 8597 (May 15, 1924) (emphasis added); *reprinted in* Mills and Willingham, *Law of Oil and Gas* 473-499 at 474 (1926). The first MLA regulations prescribed similar durational restrictions:

> Oil and gas mining leases shall be made for *periods of ten years* from the date of approval by the Secretary of the Interior and as much longer as the substances specified in the lease are produced in paying quantities.

25 C.F.R. §186.10 (1938) (emphasis added). Thereafter, in 1953, the Secretary for the first time allowed the primary

term in tribal mineral leases to be fixed on a lease-by-lease basis:

> Mining leases may be made *for a specified term not to exceed ten years* from the date of approval by the Secretary of the Interior . . . and as much longer as the substances specified in the lease are produced in paying quantities.

25 C.F.R. §186.10 (1953); 18 Fed. Reg. 4291 (July 23, 1953) (emphasis added); *see also* A. McLane, *Oil and Gas Leasing on Indian Lands* 220 (1955). Significantly, the 1953 regulation was in effect in 1971 (the year the form used for the subject leases was approved) (*see* 25 C.F.R. §171.10 (1971)), and on April 2, 1976 (the date the Woods leases were approved) (*see* 25 C.F.R. §171.10 (1976)). *This regulation is still in effect today. See* 25 C.F.R. §211.10 (1991).

In addition, the Secretary consistently has interpreted the 1924 Act and §396a of the MLA as prescribing a habendum clause for tribal leases that consists of a primary term of *fixed duration*, during which production in paying quantities must be achieved in order to continue the lease in force. *See* I *Opinions of the Solicitor, Dept. of the Interior*, at 406 (April 19, 1934); at 480 (November 12, 1934) and at 1091, (February 13, 1942); *see also* 58 I.D. 12, 13 (1942); 64 I.D. 49, 50 (1957), 80 I.D. 786, 787 (1973).

Thus, the construction of §396a of the MLA urged by the Tribe complies with Congress' intent that tribes would specify primary terms in the lease itself, on a lease-by-lease basis, for any period not to exceed ten years, within which tribes could expect production in paying quantities to occur.

Moreover, the Tribe's construction of §396a of the MLA is consistent with the underlying federal policies to maximize lease revenue and to increase tribal control over their resources in accordance with the Indian Reorganization Act of 1934. 48 Stat. 984, *codified at* 25 U.S.C. §§461-476. S. Rep. No. 985, 75th Cong., 1st Sess. (1937) at 2-3; HR Rep. No. 1872, 75th Cong., 3d Sess. (1938) at 1-3; *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767 n.5 (1985); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 200 (1985); *Morton v. Mancari*, 417 U.S. 535, 542 (1974). The Tribe's construction of the §396a MLA gives the Tribe more management control over their mineral resources by allowing them to determine on a lease-by-lease basis the period within which production must be achieved. In addition, this construction gives the Tribe a voice in determining the time within which the Tribe can expect to be paid from production revenue instead of the minimal revenues obtained through lease rentals paid in lieu of production. This measure of tribal control also deters speculation by oil companies.

B. The District Court's Decision Nullifies Congress' Intent That Tribal Mineral Leases Expire At The End Of Their Primary Terms Unless Production In Paying Quantities Occurs Within That Period.

As demonstrated above, §396a mandates a habendum clause consisting of a primary term of *fixed duration*, and a secondary term which commences when and if production in paying quantities is achieved before the end of the fixed term. However, this mandate is not self-executing. Rather, that section vests discretion in tribes to set in their

leases the duration of the primary term, within the permissible range of one to ten years.

In the Woods leases, the habendum clause provides that the tribal lease is:

> *for the term of 5 years* from and after the approval hereof by the Secretary of the Interior *and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.*

Woods lease, §1, ¶ 1. App. at 77 (emphasis added).

In addition to the habendum clause the Woods leases contain the commence drilling clause:

> If the lessee shall commence to drill a well within the term of this lease, the lessee shall have the right to drill such well to completion with reasonable diligence and if oil or gas or either of them be found in paying quantities this lease shall continue and be in force with like effect as if such well had been completed within the term of years herein first mentioned.

Woods lease, §1, ¶ 2. App. at 77.

The district court, relying on *Moncrief v. Pasotex*, 280 F.2d 235 (10th Cir.), *cert. denied*, 364 U.S. 912 (1960) (hereinafter *Moncrief*), found that a conflict existed between the habendum clause and the commence drilling clause of the Woods leases.[15] However, the Tribe argued that the

---

[15] The court in *Moncrief* held that a commence drilling clause in an Indian oil and gas lease controlled over a conflicting habendum clause requiring production before the end of the primary term. *Moncrief* involved an interpretation of a leasing statute specifically governing leases by members of the Five

habendum clause in the Woods leases is mandated by §396a and, therefore, the conflict in this case actually is between §396a and the commence drilling clause.[16] The district court rejected the Tribe's contentions, stating:

> For several reasons, the Court does not find the Tribe's argument persuasive. In the first place, because of the manner in which the subject leases were developed, it does not appear that there is any conflict between the subject leases and the express terms of 25 U.S.C. §396a. Specifically, all of the subject leases were for primary terms of five-years. Although production was not achieved within that five-year period, it was achieved, in both sections, in less than ten years after the leases were initially approved. Accordingly, if 25 U.S.C. §396a is read simply to bar any leases that remain unproductive for more than ten years, these leases are not barred by the statute. Production was achieved prior to the maximum period.

App. at 66. Thus, finding no conflict between §396a and the commence drilling clause, the district court held that, under *Moncrief*, the commence drilling clause overrides the durational restrictions of the habendum clause. This construction, permitting tribal mineral leases to be

---

Civilized Tribes. *See* Act of May 27, 1908, 35 Stat. 312 (hereinafter "1908 Act"). Significantly, unlike §396a of the MLA, there is no language in the 1908 Act controlling the duration of the lease. Thus, the 1908 Act leaves broad authority in the Secretary to determine the scope of the durational restrictions.

[16] The Tribe contended that the commence drilling clause is consistent with §396a and the habendum clause if the commence drilling clause is construed to apply to wells drilled during the secondary term of the lease.

extended beyond their fixed primary terms merely upon commencement of drilling before the end of that term, rather than upon production in paying quantities, eviscerates the durational restrictions mandated by §396a.

Furthermore, the court's decision contravenes the longstanding fundamental principle of federal Indian law that conveyances of tribal lands, including minerals,[17] are absolutely prohibited except as expressly authorized by Congress. *See* 25 U.S.C. §177; *United States v. Noble*, 237 U.S. 74, 80-81 (1915) (restrictions on conveyances of tribal land "are removed only to the extent specified [in the statute]; otherwise, the prohibition against alienation [remains] absolute."); *Smith v. McCullough*, 270 U.S. 456, 463-65 (1926). The district court's approval of a commence drilling clause in tribal mineral leases allows a conveyance of tribal property on terms that are inconsistent with the dictates of §396a. That section expressly authorizes leases to continue in force by production before the end of the primary term. It does not expressly authorize leases to be continued in force by the mere commencement of drilling before the end of the primary term. Neither the Secretary nor the Tribe has the

---

[17] Unsevered minerals are deemed to be an interest in lands, and therefore, cannot be sold without appropriate authorization. S. Rep. 97-472, 97th Cong. 2d Sess. (June 10, 1982) (report on amendments to the MLA, permitting tribes to enter into certain agreements for the disposition of tribal mineral resources, *codified at* 25 U.S.C. §2101).

authority to agree to a lease provision which deviates from the dictates of §396a.[18]

III. NOTWITHSTANDING THE LACK OF A TENTH CIRCUIT DECISION, IT IS APPROPRIATE FOR THIS COURT TO RULE ON THE QUESTION PRESENTED.

As discussed earlier in this petition, the Tenth Circuit failed to resolve the MLA issue, and thus the only judgment and opinion on the issue is that of the district court. However, notwithstanding the lack of an appellate court decision, this Court will grant a petition for a writ to resolve an important statutory question. As this Court has observed:

> The failure of the Court of Appeals to address the statutory issue decided by the District Court does not, of course, prevent this Court from reaching the issue. We conclude that it is appropriate to reach the issue in this case, rather than remand it to the Court of Appeals, because it was fully aired before the District Court, it involves the application of settled legal principles to uncontroversial facts. . . .

---

[18] Moreover, if Congress had intended the MLA to authorize nonproducing leases to continue in force beyond the primary term, it could have and would have done so expressly in the Act. *See, e.g.*, Act of August 8, 1946, 60 Stat. 950, 951-52, amending §17 of the Public Lands Mineral Leasing Act of 1920, 30 U.S.C. §226, to authorize for the first time an extension beyond the fixed primary term for nonproducing leases of proven lands if, at the time of expiration of the primary term, diligent drilling was in progress.

New York Transit Authority v. Beazer, 440 U.S. 568, 583 n.24 (1979); *accord Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-72 (1974) (district court orders were reviewed because the issues were "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."). Therefore, the Tribe respectfully submits that the importance of the question presented by this petition warrants review by this Court, notwithstanding the lack of a Tenth Circuit decision.

Alternatively, the Tribe urges the Court to exercise its supervisory powers and remand the question to the appellate court for judgment and opinion. This procedure is appropriate when the Supreme Court considers the appellate court's insights "an important aid in the consideration of the case. . . . " *Virginian Ry. Co. v. United States*, 272 U.S. 658, 675 (1926), *see also Taylor v. McKeithen*, 407 U.S. 191, 194 (1972) (per curiam) (Supreme Court accepted the case on certiorari but vacated and remanded the case to the court of appeals, "because the record does not fully inform us of the precise nature of litigation and because we have not had the benefit of the insight of the Court of Appeals."); and *Northcross v. Board of Education*, 412 U.S. 427, 428-29 (1973) (per curiam) (certiorari granted, but remanded "Since it is impossible for us to determine whether the Court of Appeals applied the [proper] standard"). Thus, considerations of fairness and judicial economy would justify the exercise of this Court's supervisory power to grant the petition and

remand the question presented to the Tenth Circuit for judgment and opinion.

CONCLUSION

For the foregoing reasons, Petitioner, the Cheyenne-Arapaho Tribes of Oklahoma, respectfully submits that this Court should grant the Petition for a Writ of Certiorari and either reverse the judgment of the district court below, or, alternatively, remand the issue presented to the Court of Appeals for the Tenth Circuit for resolution.

Dated this 29th day of January, 1993.

Respectfully submitted,

YVONNE T. KNIGHT
Counsel of Record
PATRICE KUNESH
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Petitioner Cheyenne-Arapaho Tribes of Oklahoma

TABLE OF CONTENTS

Page

Decisions

Order, United States Court of Appeals for the Tenth Circuit, denying Cheyenne-Arapaho Tribes of Oklahoma's petition for rehearing and denying Woods Petroleum Corporation's petition for rehearing with suggestion for rehearing en banc, filed 11/2/92 ..... App. 1

Opinion, United States Court of Appeals for the Tenth Circuit, affirming, in part, the district court's order of May 26, 1989, filed June 5, 1992 ..... App. 3

Order, United States District Court for the Western District of Oklahoma, CIV-84-1765-A, filed May 26, 1989 ..... App. 23

Statutory and Regulatory Provisions

25 U.S.C. §396a ..... App. 74

25 C.F.R. §171.10 (1976) ..... App. 74

Proposed Regulation

56 Fed. Reg. 58740-41, November 21, 1991 (Proposed Rules) ..... App. 75

Lease

Oil and Gas Mining Lease No. 14-20-205-6896 – Tribal Indian Lands (Township 14 North, Range 20 West Section 32: NW/4, dated April 2, 1976, approved by Bureau of Indian Affairs, Concho Agency, on May 10, 1976) ..... App. 76

Miscellaneous

Diagram of Communitized/Production Units – Sections 29 and 32 ..... App. 88

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA,	)	
Plaintiff-Appellee, Cross-Appellant,	)	Nos. 89-6270 89-6355
v.	)	
WOODS PETROLEUM CORPORATION,	)	
Defendant-Appellant, Cross-Appellee.	)	

ORDER

Filed November 2, 1992

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges, and BRIMMER*, District Judge.

This matter comes on for consideration of the petition for rehearing filed by the Cheyenne-Arapaho Tribes of Oklahoma, and the petition for rehearing with suggestion for rehearing en banc filed by Woods Petroleum corporation.

---

* The Honorable Clarence A. Brimmer of the United States District Court for the District of Wyoming, sitting by designation.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all of the judges of the court who are in regular active servie. [sic] The court having been polled on the suggestion for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, rehearing en banc is denied. Judges Baldock, Ebel, and Kelly would grant rehearing en banc.

Entered for the Court

ROBERT L. HOECKER, Clerk

/s/ Patrick Fisher
By Patrick Fisher
Chief Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, Plaintiff-Appellee and Cross-Appellant vs. THE UNITED STATES OF AMERICA; THE DEPARTMENT OF THE INTERIOR; WILLIAM P. CLARK, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR; WILLIAM P. RAGSDALE, INDIVIDUALLY AND AS AREA DIRECTOR, ANADARKO AREA OFFICE, BUREAU OF INDIAN AFFAIRS; TOM DOWELL, INDIVIDUALLY AND AS SUPERINTENDENT, CONCHO INDIAN AGENCY, BUREAU OF INDIAN AFFAIRS, Defendants, and THE WOODS PETROLEUM CORPORATION, Defendant-Appellant and Cross-Appellee.	Nos. 89-6270 & 89-6355 (Filed June 5, 1992)

APPEAL FROM A CERTIFIED INTERLOCUTORY ORDER UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA D.C. NO. CIV-84-1765-A

Robert T. Anderson of the Native American Rights Funds of Boulder, Colorado (Patrice Kunesh-Hartman and Yvonne T. Knight with him on the brief) for Plaintiff-Appellees/Cross-Appellants.

Kent L. Jones of Hall, Estill, Hardwick, Gable, Golden & Nelsen, P.C. of Tulsa, Oklahoma (Orval E. Jones with him on the brief) for Defendant-Appellant/Cross-Appellee.

Before ANDERSON and BRORBY, Circuit Judges, and BRIMMER, Chief District Judge.*

BRIMMER, Chief District Judge

---

*Honorable Clarence A. Brimmer, Chief U.S. District Judge for the District of Wyoming, sitting by designation.

This action seeking judicial review of the decision of a federal agency was initiated by the plaintiff, Cheyenne-Arapaho Tribes of Oklahoma (hereinafter "Tribe") on July 17, 1984. Jurisdiction of the district court was based upon 28 U.S.C. §§ 1331 and 1362.[1] This Court has appellate

---

[1] 28 U.S.C. § 1362 gives original jurisdiction to all civil actions brought by any recognized Indian tribe. As per the Tribe's complaint, its claims fall under the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a to 396g; the Administrative Procedure Act, 5 U.S.C. §§ 701 to 706; the due process clause of the Fifth Amendment to the Constitution of the United States; and cer-

jurisdiction pursuant to 28 U.S.C. § 1292(b)[2]. The district court certified its order for appeal on May 26, 1989. This Court granted appellant Woods Petroleum Corporation's (hereinafter Woods) petition to take an interlocutory appeal on July 24, 1989, and Tribe's petition for cross-appeal on October 20, 1989. The United States did not take an interlocutory appeal.

Background

The district court's summary judgment ruling overturned the Bureau of Indian Affairs' (hereinafter BIA) 1981 decision to approve two communitization agreements unitizing oil and gas operations on two 640-acre spacing units (Sections 29 and 32) owned by the Tribe in Custer County, Oklahoma. Woods had four oil and gas leases in Sections 29 and 32, each covering 160 acres, which were approved by the Concho Agency Superintendent on May 10, 1976.[3] Reading and Bates Petroleum Company acquired two leases covering 160 acres each in

---

tain regulations of the United States Department of the Interior ("Department").

[2] § 28 U.S.C. § 1292 allows interlocutory orders to be appealed in the discretion of the district court. The interlocutory order appealed from in this case was a partial grant and partial denial of summary judgment to the Tribe.

[3] The Woods leases in Custer County, Oklahoma were Number 14-20-205-6895, covering the NE/4, section 32-14N-20W; Number 14-20-205-6896, covering the NW/4, section 32-14N-20W; Number 14-20-205-6897, covering the SE/4, section 32-14N-20W; and Number 14-20-205-6894, covering the SW/4, section 29-14N-20W.

Sections 29 and 32 on February 22, 1980.[4] The primary term of each lease was for 5 years and as much longer thereafter as oil and/or gas was produced in paying quantities. Each of the 1976 leases contained a commence drilling clause, which purported to extend the lease if drilling was commenced during the primary term.

Each lease also contained a unit operation clause (hereinafter Clause 9) which dealt with communitization[5] by providing that:

> The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the lease lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

Under a communitization agreement, drilling operations conducted anywhere within the unit area are deemed to occur on each lease within the communitized area and production anywhere within the unit is considered to be produced from each tract within the unit. *Kenai Oil & Gas, Inc. v. Dept. of Int. of U.S.*, 671 F.2d 383, 384 (10th Cir. 1982). Communitization agreements formed pursuant to Clause 9, in conjunction with the commence drilling clause, thus extend the terms of all the leases if drilling is

---

[4] The Reading and Bates Leases were Number 14-20-205-7672, covering the NE/4, section 29-14N-20W and Number 14-20-205-7675, covering the SW/4, section 32-14N-20W.

[5] The terms communitization and unitization are used synonymously in this opinion.

commenced on any lease within the units covered by the agreements.

Since the five year leases signed in 1976 would have expired on May 10, 1981, a flurry of activity occurred among the lessees prior to that date. Woods and Reading and Bates, as owners of the leases in sections 29 and 32, agreed on April 1, 1981 to communitize the tracts and leases in each section for unitized drilling and production. The communitization agreements designated Reading and Bates as the operator of the unit wells in both sections. Reading and Bates Petroleum Company requested the Tribe's approval of the proposed communitization agreements by letter dated April 15, 1981. The USGS issued a permit on April 22, 1981 authorizing Reading & Bates to commence drilling operations in Section 32. On April 22 and April 23, 1981, the chairman of the Tribe's business committee and the Tribe's business manager met with the Reading and Bates representative and officials from the Anadarko Area Office of the BIA and explained that they would not agree to the communitization agreements unless the 1976 leases were renegotiated. Tribal officials requested a lease bonus of $1500 per acre as well as a ten percent back-in working interest in the Woods leases. Reading and Bates rejected any renegotiations of the Woods leases on May 1, 1981.

By letter dated May 1, 1981, Reading and Bates demanded that the Tribe assent to the communitization agreements. The letter stated that in the event the leases were lost, Reading and Bates would "pursue every legal remedy" in order to receive restitution for the losses that

it might sustain.[6] On May 5, 1981, Reading and Bates submitted the proposed communitization agreement to the United States Geological Survey (USGS) for approval. The USGS recommended approval of both agreements on the basis that they appeared to offer adequate protection to the restricted Indian interests. On May 8, 1981, the Acting Area Director of the Anadarko Office of the BIA approved both communitization agreements.

On August 5, 1981, the Tribe filed a notice of appeal of the Area Director's decision to approve the communitization agreements. Subsequently, on February 9, 1982, the Deputy Assistant Secretary of the Department of the Interior affirmed the Acting Area Director's decision. The Tribe then appealed this decision to the BIA. On February 10, 1983, the BIA entered an order affirming the Anadarko Director's decision. The BIA then granted the Tribe's petition for rehearing and called for supplementation of the record so that the reasons for the Area Director's approval of the agreements could be set forth in more detail. Upon consideration of supplemental materials, the BIA entered an order on May 18, 1984 reaffirming the Area Director's May 1981 decision to approve the communitization agreements.

The Tribe then commenced an action in the United States District Court for the Western District of Oklahoma. The fundamental issue before the district court was whether the BIA's approval of the communitization agreements extended the primary terms of certain leases on the Tribe's land. Subsequently, summary judgment

---

[6] Ad. Rec. at 678.

motions were filed by the parties. Upon review of the record, the district court concluded that the administrative record was inadequate to resolve the issues raised. The court remanded the case to the Secretary of the Interior with instructions to respond to particular questions presented by the court. After the Secretary entered his response to the Order of Remand, the parties filed a second round of summary judgment motions. This appeal is from the order on those motions.

In the action below, Woods contended that the issues raised by the Tribe were not properly before the district court because the Tribe's administrative appeal of the approval of the communitization agreements was not timely. The court below disagreed, finding that the Tribe did not receive written notice as per 25 C.F.R. § 2.4, and concluding that the Tribe's filing of its appeal on August 5, 1981 was not untimely under 25 C.F.R. § 2.10. In addition, the district court found that Woods failed to demonstrate that it had been prejudiced by the delay in the filing of the Tribe's appeal. Since the Tribe's administrative appeal was timely, the district court declared that the issues raised by the Tribe were properly before it.

The district court found that the record did not establish that the parties to the 1976 leases intended Clause 9 (the unit operation clause) to require particularized tribal consent to each communitization agreement. The court analyzed the language of Clause 9, and found that the provision constituted a blanket consent to future communitization agreements. There was no finding of a fundamental conflict between the blanket consent interpretation of Clause 9 and the policies underlying the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a to 396g

(hereinafter MLA). In addition, the district court interpreted the law existing in 1976 when the leases were executed as supporting the blanket consent interpretation of Clause 9. The court concluded that lack of Tribal consent did not invalidate the communitization agreements. The district court also found that the Area Director breached his trust responsibility to the Tribe under the MLA by approving the communitization agreements without studying the economic conditions prevailing at the time. As a result of this breach of trust, the court held that the communitization agreements did not extend the non-drilling 1976 leases, and those leases thus expired at the end of their primary terms. The district court denied the Tribe's cross-motion for partial summary judgment on the issue of whether the Woods' leases violated the MLA, holding that the commence drilling clauses of the leases operated to extend those leases if drilling was commenced during the primary term set forth in the habendum clauses. The court denied the Tribe's cross motion for summary judgment on the issue of whether Woods' leases were amended by the communitization agreements to condition extension beyond their primary terms on production rather than drilling, on the basis that the matter had not been properly raised at the administrative level.

As a result of the court's ruling, three leases on which no drilling occurred during their primary terms expired on May 10, 1981.[7] Consequently, as of May 10, 1981, the Tribe was the rightful owner of all the working

---

[7] Those leases were Numbers 14-20-205-6894, 14-20-205-6895 and 14-20-205-6897.

interest and the royalty interest in those tracts, and was thus entitled to certain revenues attributable to the tracts after May 10, 1981.

Appellate Contentions

On appeal, Woods contends that (1) the administrative appeal of the Tribe was not timely, and that (2) the district court improperly substituted its own economic judgment for that of the Department in determining whether or not to approve the communitization agreements.

In discounting Woods' argument that the Tribe's appeal of the administrative action was not timely, the Tribe notes that it never received formal written notice of the adverse administrative action as required by 25 C.F.R. § 2.4. The Tribe replies that the district court was correct in its ruling that the Secretary of the Interior breached his trust responsibility to the Tribe by failing to consider current economic conditions prior to approving the communitization agreements. The Tribe also contends that the district court's interpretation of Clause 9 is inconsistent with the intent and purpose of the Mineral Leasing Act to maximize tribal control. In addition, the Tribe claims that all four leases expired for failure to achieve production in paying quantities before the end of the primary term because the commence drilling clause is in conflict with MLA and, thus, unlawful.

Since our ruling on Woods' contentions will effectively dispose of this action, the Court will address its opinion only to the timeliness issue and the question of

whether the Secretary should have considered economic factors.

I.

Standard of Review

The Circuit Court of Appeals reviews the district court's grant or denial of a summary judgment motion by applying the same legal standard employed by the district court under Rule 56(c) of the Federal Rules of Civil Procedure. *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 613 (10th Cir. 1988); *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988). Summary judgment should be granted, and will be affirmed, only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In applying this standard, the court must examine the factual record and make reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Gray v. Phillips Petroleum Co.*, 858 F.2d at 613. The standard provides that the mere existence of *some* factual dispute will not frustrate an otherwise proper summary judgement. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

The court must decide if the substantive law was correctly applied. *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d at 143. The appellate court applies a *de novo* standard of review to all legal determinations made by the district court. *Goichman v. City of Aspen*, 859 F.2d 1466, 1467 (10th Cir. 1988). The court may affirm the grant or denial of summary judgment if any proper ground exists to support the lower court's ruling. *Id.* at 1468. Affirmance of summary judgment need not be based on the

grounds relied upon by the district court, but may be based on any proper grounds for which the record is sufficient to permit conclusions of law. *Griess v. Colorado*, 841 F.2d 1042, 1047 (10th Cir. 1988).

II.

Was the Administrative Appeal Timely?

Woods contends that the district court should have dismissed the Tribe's claims for failure to commence the administrative appeal within the mandatory thirty-day period prescribed by regulation. The communitization agreements at issue in this case were approved by the Anadarko Area Office on May 8, 1981. The Tribe did not file its administrative appeal until August 5, 1981. Woods argues that the Tribe knew that the agreements had been approved, and yet indulged in a prejudicial delay of 89 days before filing the appeal.[8] Woods claims that the Tribe received actual, personal notice of the decision from Reading and Bates on May 9, 1981 and had received copies of the communitization agreements prior to May 9.

The record reflects, however, that the Tribe did not receive notice in writing given by the official making the decision or taking the action. Pursuant to 25 C.F.R. § 2.4, failure to give such notice extends the time in which appeal from the decision may be taken.[9] The regulation is

---

[8] There is no evidence in the record to indicate how, or indeed if, Woods was prejudiced.

[9] The 1981 text of 25 C.F.R. § 2.4 read in part:

> This notice shall be in writing and shall be given by the official making the decision or taking the action.

explicit: when proper notice has not been given, the right to appeal continues until such notice is received. The Tribe's appeal was timely.

III.

Should the Secretary Have Considered Economic Factors?

The proper function of courts when reviewing an administrative order is to assure that the relevant factors were considered by the agency and that the decision-maker made no clear error of judgment. *Kenai Oil & Gas, Inc. v. Department of Interior*, 671 F.2d 383, 386 (10th Cir. 1982). Appellant Woods claims that the district court abused that function by (1) substituting its own views for those of the agency upon economic judgments within the discretion of the agency, and by (2) considering irrelevant factors. We disagree with both contentions.

Approval of communitization agreements falls within the discretion of the Secretary of the Interior pursuant to 25 U.S.C. § 396d, which states that:

> All operations under any oil, gas, or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a-396g of this title shall be made subject to the terms of any reasonable cooperative unit or

---

Failure to give such notice shall not affect the validity of the action or decision, but the right to appeal therefrom shall continue under the regulation.

> other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

Regulations concerning leases on restricted Indian lands require the Secretary's approval of cooperative agreements:

> All such leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.

25 C.F.R. § 171.21(b) (now § 211.21(b)).

Although 25 U.S.C. § 396d and 25 C.F.R. § 211.21(b) do not so expressly state, the United States' function as a trustee over Indian lands necessarily limits the Secretary's discretion to approve communitization agreements. Even in the absence of express language about a trust fund, a trust, or a fiduciary connection, when the Government controls tribal monies or properties, a fiduciary relationship normally exists with respect to those monies or properties. *Navajo Tribe of Indians v. United States,* 624 F.2d 981, 987 (Ct. Cl. 1980). The United States Supreme Court has stated that:

> [A] fiduciary relationship necessarily arises when the Government assumes . . . elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United

> States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).

United States v. Mitchell, 463 U.S. 206, 225 (1983). The Supreme Court noted in *Mitchell* that the existence of a general trust relationship between the United States and the Indian people is undisputed. *Id.* at 225.

Mitchell deals with holding the United States accountable in money damages for alleged breaches of trust in connection with management of forest resources, and the underlying message clearly establishes the existence of a fiduciary relationship when statutes and regulations give the Federal Government a pervasive role in management of Indian properties. *Id.* at 224. There can be no question that 25 U.S.C. § 396d relegates control of oil and gas leases on Indian lands to the Secretary of the Interior. *See Jicarilla Apache Tribe v. Supron Energy*, 728 F.2d 1555, 1563 (10th Cir. 1984), (Seymour, J., concurring in part and dissenting in part), *dissenting opinion adopted as the majority opinion as modified*, 782 F.2d 855 (10th Cir. 1986) (en banc); *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. The Board of Oil and Gas Conservation of the State of Montana*, 792 F.2d 782, 794 (9th Cir. 1986); and *Blackfeet Tribe of Indians v. Montana*, 729 F.2d 1192, 1199 & n. 18 (9th Cir. 1984) (en banc), aff'd, 471 U.S. 579 (1985). Therefore, the Secretary's discretion to approve or disapprove leases and communitization agreements must be governed by fiduciary standards and limited by fiduciary duties.

Since the Secretary's discretion is limited by the fiduciary responsibilities vested in the United States as

trustee of Indian lands and as the supervisor and administrator of oil and gas leases on those lands, the following holds true:

> Acting in the capacity as a trustee, the Secretary and his delegate, the Superintendent of the BIA, must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues.

Kenai, 671 F.2d at 386, citing *Gray v. Johnson*, 395 F.2d 533, 536 (10th Cir. 1968), *cert denied*, 392 U.S. 906 (1968). "If the Superintendent considered all relevant factors in reaching his decision and has made no clear error of judgment, his action cannot be overturned." *Kenai* at 386, citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). *See also Sabin v. Butz*, 515 F.2d 1061, 1067 (10th Cir. 1975). The issues decided in the district court and now before this Court are if a genuine issue of material fact exists as to whether the Secretary considered all the factors relevant to a fiduciary's decision and whether the Secretary complied with his duty to maximize lease revenues when he approved the communitization agreements.

The district court remanded the case to the Secretary for further explanation of the reasons underlying the approval of the communitization agreements. A review of the record indicates that the Secretary's response to the Order of Remand included economic benefit for the Tribe as one justification for approval of the communitization agreements. The record shows, however, that the Area Director, as the Secretary's delegate, did not consider all

the relevant economic factors. The Secretary acknowledged in his response that the Acting Area Director of the Anadarko Office of the BIA "did not consider any evidence of the market value and marketability of the new lease."[10]

Unusual conditions existed in the Anadarko area in the early 1980's. The record establishes that the Area Director reported to the Secretary that deep gas discovery in the Anadarko area had prompted a short period of astronomical bids on advertised mineral tracts. A comparison of lease bonuses obtained by the Tribe on the various tracts located in Sections 29 and 32 shows that for each of the 1976 leases at issue, the Tribe received a bonus of thirty-five dollars per acre and a royalty rate of sixteen and two-thirds percent.[11] By contrast, the two 1980 leases to Reading and Bates yielded a bonus to the Tribe of two hundred and thirty-five dollars an acre and a royalty rate of twenty percent on one tract, and a bonus of three hundred and fifteen dollars per acre and a twenty percent royalty rate on the other tract.[12]

The Secretary stated that the bonus paid when Woods acquired the oil and gas leases was compensation for the right to develop the leasehold for a specified term of years, and because the Indian leases were still in their primary terms at the time the communitization agreements were approved, there was no reason to require an

---

[10] *See* Attachments to Appellee's Response to Appellant's Opening Brief, Tab 2 at 8.

[11] *See* Attachments to Appellee's Response to Appellant's Opening Brief, Tab 2 at 7.

[12] *Id.*

evaluation of the market value and marketability of the leases in 1981. According to the Secretary, disapproval of the communitization agreements and failure to communitize the unit would have resulted in losing several leases, and it was unlikely that new leases would have been negotiated. The Secretary explained that, since the losing lessees would probably have resorted to retaliatory litigation, "It was the Area's belief that no lessee would be willing to risk leasing any of the tracts that were involved in litigation or were de-spaced. Thus the Area did not believe that the Tribe would receive any increased revenues from re-leasing."[13] Relying on such a justification would, however, result in across-the-board approvals of communitization agreements. The threat of litigation may be intimidating, but careful analysis of relevant factors takes precedence over avoiding a lawsuit.

The Secretary and his delegates acted inconsistently with fiduciary responsibilities owed to Indian mineral interest owners. In light of the Anadarko Area conditions and the market for oil and gas, the conclusions reached as to the market value and marketability of leases prior to the boom period of 1980 and 1981 should have been reconsidered. After reviewing the record, this Court agrees with the district court that the trust responsibilities to the Tribe were uncontrovertedly breached by failure to examine all relevant factors before approving the agreement.

---

[13] *See* Attachments, Appellee's Response to Appellant's Opening Brief, Tab 2 at 10.

Factors relevant to an agency's decision to approve communitization agreements were discussed by this Court in *Kenai, supra,* which involved the Secretary's refusal to approve communitization agreements. In *Kenai* we held that:

> . . . limiting the Superintendent's considerations solely to matters of conservation and production would be inconsistent with his trust responsibilities to the Indians in leasing tribal lands. In light of these trust responsibilities, the Superintendent must take the Indians' best interests into account when making any decision involving leases on tribal lands, and has broad discretion to consider all factors affecting their interests. The Superintendent has no obligation to approve a plan which does not serve the Indians' best interests and he has acted within his discretion in refusing to approve an economically unsatisfactory plan.

Kenai, 671 F.2d at 387. Appellant Woods claims that the fact that unitized development is indisputably proper sufficiently supports the Secretary's economic judgment to approve communitization. Woods contends that the quintessential component of communitization of leases is whether the proposed plan is reasonable and appropriate for the purpose of proper development and conservation of natural mineral resources. Since the proposed plan was reasonable and appropriate, Woods argues, the Secretary's approval was within his discretion.

Appellant's argument completely ignores the fiduciary relationship between the Secretary and the Tribe. When the Secretary is obligated, as in this case, to act as a fiduciary, "then his actions must not merely meet the

minimal requirements of administrative law, but must also pass scrutiny under more stringent standards demanded of a fiduciary." *Jicarilla*, 728 F.2d at 1563. The Area Director, as a delegate of the Secretary of the Interior, has broad administrative discretion to consider all factors affecting the Tribe's interests, but his fiduciary responsibilities do not allow such discretion when it comes to *not* considering certain factors. The Area Director was not free to conclude, without some consideration of the present market conditions, that new leases would be as difficult to negotiate as they would have been in pre-boom times. Absent consideration of current market developments, the Area Director's conclusion that he could not protect the Tribe's economic interests if the communitization agreements were disapproved was inconsistent with the agency's fiduciary obligations to the Tribe, and seems more consistent with a policy of blanket approval than with a policy of maximizing tribe revenues.[14]

---

[14] Woods claims that the Secretary cannot disapprove communitization agreements for the sole purpose of allowing the underlying leases to lapse so that the Tribe may gain revenues by re-leasing. *See Cotton Petroleum Corp. v. United States Dep't of the Interior*, 870 F.2d 1515, 1527-28 (10th Cir. 1989). Woods' claim is consistent with *Cotton*, in which we refused to defer to the Secretary's decision since he considered only economic factors, rather than all relevant factors. *Id.* at 1527-28. This is not a *Cotton* situation, however: although our holding today has the ultimate effect of denying the communitization agreements, that effect is merely the aftermath of the Secretary's failure to consider the prerequisite relevant economic factors in his decision to approve the agreements. As per *Kenai*, our opinion is that those economic factors were indeed relevant and should have been considered. 671 F.2d at 387. In *Kenai*, we *deferred* to the Secretary's decision because he considered economic, conservation and production factors. *Id.* However, in the case at bar, as in

In this instance, the Secretary and his delegates should have considered the economic realities of an oil and gas lease in the Anadarko region in the early 1980's as compared to 1976. The failure to do so was arbitrary, capricious and an abuse of discretion. This Court finds that the district court correctly applied the substantive law in determining that the Secretary and his delegates breached their fiduciary responsibilities to the Tribe.

IV.

Summary

In conclusion, we find that the Tribe's administrative appeal was timely. We also find that the Secretary and his delegates breached their fiduciary responsibilities to the Tribe by failing to consider the market conditions in the Anadarko Area during the early 1980's. We agree with the district court that such conditions were factors relevant to the agency's decision, and failure to consider them therefore constitutes an arbitrary and capricious abuse of discretion by the Secretary and his delegates.

Because the Secretary abused his discretion, the communitization agreements are not valid, and the leases upon which drilling had not commenced as of May 10, 1981 expired on that date. Accordingly, the order of the district court granting summary judgment to the Tribe is **AFFIRMED.**

Cotton, we cannot defer since the Secretary did not consider all relevant factors.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, Plaintiff,	)	No. CIV-84-1765-A (Filed May 26, 1989)
v.	)	
THE UNITED STATES OF AMERICA, et al., Defendants.	)	

ORDER

This case is before the Court for consideration of a number of motions for summary judgment: (1) the Motion for Partial Summary Judgment on the Tribal Consent and Secretarial Authority Issues, filed by the plaintiff, the Cheyenne-Arapaho Tribes of Oklahoma (the Tribe); (2) the Tribe's Cross-Motion for Partial Summary Judgment on the Issue of Whether the Woods Leases Violate the Indian Mineral Leasing Act of 1938; (3) the Tribe's Cross-Motion for Summary Judgment on the Issue of Whether the Woods Leases Were Amended by the Communitization Agreements to Condition Extension Beyond Their Primary Terms on Production Rather than Drilling; (4) the defendant Woods Petroleum Corporation's (Woods') Motion for Summary Judgment; (5) the Motion for Summary Judgment filed by the defendants the United States of America, the Department of the Interior, William P. Clark, individually and as Secretary of the Interior; William P. Ragsdale, individually and as Area Director of the Anadarko Office of the Bureau of

Indian Affairs; and Tom Dowell, individually and as Superintendent of the Concho Agency of the Bureau of Indian Affairs (collectively referred to as the federal defendants). Having carefully considered the briefs and oral arguments presented in support of these motions, the Court enters the following findings of fact and conclusions of law.

I. Factual Background

This case concerns the Bureau of Indian Affairs' (BIA's) approval of two communitization agreements concerning oil and gas leases on lands owned by the Tribe in Custer County, Oklahoma. The fundamental issue is whether the BIA's approval of the subject agreements extended the primary terms of certain leases on the Tribe's land.

The record indicates that the plaintiff, a federally recognized Indian tribe organized under a constitution and bylaws approved by the Secretary of the Interior, entered into the following oil and gas leases with the defendant Woods in 1976: (1) lease number 14-20-205-6895, covering the northeast quarter of Section 32-14N-20W in Custer County Oklahoma; (2) lease number 14-20-205-6896, covering the northwest quarter in Section 32-14N-20W in Custer County; (3) lease number 14-20-205-6897, covering the southeast quarter of Section 32-14N-20W in Custer County; (4) lease number 14-205-6894, covering the southwest quarter of Section 29-14N-20W. Each lease was for a primary term of "5 years from and after the approval hereof of the Secretary of the Interior and as much longer thereafter as oil and/

or gas is produced in paying quantities from said land." All four leases were approved by the Superintendent of the Concho Office of the BIA on May 10, 1976. Under each of these leases, Woods was the sole lessee and owner of all of the working interest in each lease.

Each of the leases covers 160 acres, all of which is held in trust by the United States for the Tribe. However, as to the surrounding tracts, there are some important differences between the leases in Section 29 and the leases in Section 32. Specifically, in Section 29, in addition to the 160 acre tract here at issue, there is another 160 acre tract held by the United States in trust for the Tribe. However, the other 320 acres in Section 29 is owned by non-Indians. In contrast, in Section 32, all of the tracts are held by the United States in trust for the Tribe.

In both Sections 29 and 32, measures were taken to unitize the mineral interests involved. On July 17, 1980, the Oklahoma Corporation Commission entered an order establishing 640 acre drilling and spacing units for both sections. Subsequently, in the spring of 1981, the working interest owners in Sections 29 and 32 entered into communitization agreements pooling the mineral interests in each section. Under these agreements, drilling operations in any part of the section would be deemed to occur on each lease within the section. Since each of the 1976 leases contained a drilling clause purporting to extend the lease if drilling was commenced during the 5 year primary term, the effect of the communitization agreements would be to extend the terms of all the leases in Sections 29 and 32 if drilling was commenced on any lease within these sections. Under the agreements, Reading and Bates Petroleum Company (which had acquired leases for the

northeast quarter of Section 29 and the southwest quarter of Section 32 in February, 1980) was designated as the operator of the unit wells in both sections.

In both Sections 29 and 32, drilling of unit wells had commenced by May 1981. In Section 29, the drilling of the unit well began on the northeast quarter on November 30, 1980. By May 1981, the unit well had progressed to a depth of 15,073 feet. In Section 32, the unit well was spudded on May 6, 1981 in the northwest quarter, and, by May 8, 1981, drilling had progressed to a depth of 16,084 feet.

Although the working interest owners in Section 29 and 32 entered into communitization agreements covering each section, the Tribe did not consent to these particular agreements. On April 16, 1981, a representative of Reading and Bates Petroleum Company delivered the proposed communitization agreements to the Tribe's business office and requested the Tribe's approval. Subsequently, on April 22 and April 23, 1981, the chairman of the Tribe's business committee and the Tribe's business manager met with the Reading and Bates representative and officials from the Anadarko Area Office of the BIA and explained that they would not agree to the communitization agreements unless the 1976 leases were renegotiated. In subsequent meetings with the Reading and Bates representative, tribal officials demanded a lease bonus of $1500 per acre as well as a ten percent back-in working interest in the leases.

On May 1, 1981, Reading and Bates and the other working interest owners in Section 29 and 32 rejected the Tribe's demand for renegotiation of the leases. In

response to the Tribe's demand, Reading and Bates sent a letter to the Tribal treasurer demanding that the Tribe consent to the proposed communitization agreements. The letter stated that in the event that leases were lost, Reading and Bates would "pursue every legal remedy" in order to receive restitution for the losses that it might sustain.

On May 5, 1981, Reading and Bates submitted the proposed communitization agreement to the United States Geological Survey for approval. The USGS recommended approval of both agreements on the following day. On May 8, 1981, the Acting Area Director of the Anadarko Office of the BIA approved both communitization agreements.

On August 5, 1981, the Tribe filed a notice of appeal of the Area Director's decision to approve the communitization agreements. Subsequently, on February 9, 1982 the Deputy Assistant Secretary of the Department of the Interior affirmed the Acting Area Director's decision. The Tribe then appealed this decision to the Court of Indian Appeals. On February 10, 1983, the Court of Indian Appeals entered an order affirming the Anadarko Area Director's decision. Subsequently, the Court of Indian Appeals granted the Tribe's petition for rehearing and called for supplementation of the record so that the reasons for the Area Director's approval of the agreements could be set forth in more detail. Upon consideration of supplemental materials, on May 18, 1984, the Court of Indian Appeals entered an order reaffirming the Area Director's May 1981 decision to approve the subject agreements.

The Tribe then commenced this action. In its Complaint, the Tribe asserts the following claims, each setting forth a different legal theory in support of its contention that the 1976 leases expired at the end of their primary terms: (1) the Tribe contends that all four of the subject leases terminated at the end of their primary terms because production was not achieved in paying quantities at the end of these terms. According to the Tribe, since the "commence drilling clauses" in the leases (purporting to extend their terms by the commencement of drilling rather than the achievement of production) are not authorized by the Mineral Leasing Act, 25 U.S.C. §396a et seq. or the regulations implementing it, these clauses are void; (2) the Tribe contends that all four of the subject leases terminated in 1981 because the communitization agreements here at issue amended the leases such that the leases would expire if production was not achieved by the end of their primary terms; (3) the Tribe contends that the three 1976 leases in which drilling did not occur terminated in 1981 because, in approving the subject communitization agreements without performing a sufficient economic analysis of the impact of such approval on the Tribe, the Acting Area Director breached his fiduciary duty to the Tribe; (4) the Tribe contends that the three non-drilling leases terminated in 1981 because the Acting Area Director's approval of the communitization agreements was not rationally based; and (5) the Tribe contends that the non-drilling leases terminated in 1981 because the Tribe did not consent to the subject communitization agreements. Under all five causes of action, the Tribe requests the Court to issue an order evicting the defendant Woods from the terminated leases.

The Tribe also requests that Woods be held liable for trespassing on the subject leases after 1981 and that Woods be required to account for the full market value of the products converted as a result of the trespass.

Subsequently, summary judgment motions were filed by the parties. Upon review of the record, the Court concluded that the administrative record was inadequate to resolve the issues raised. The Court remanded the case to the Secretary of the Interior with instructions to respond to particular questions propounded by the Court. After the filing of the Secretary's response to the Order of Remand, the parties filed this second round of summary judgment motions.

II. Timeliness of Administrative Appeal

Woods contends that none of the issues raised by the Tribe are properly before the Court because the Tribe's administrative appeal of the approval of the subject communitization agreements was not timely. In support of this argument, Woods notes that although members of the Tribe's business committee were informed of the agreements' approval on May 9, 1981, the Tribe did not file a notice of its administrative appeal until August 5, 1981. Woods invokes 25 C.F.R. §2.10(a), which provides, in part, that notices of appeal of BIA decisions "must be received in the office of the official who made the decision within 30 days after the date notice of the decision complained of is received by the appellant. . . . " According to Woods, since 25 C.F.R. §2.10(b) provides that untimely notices of appeal will not be considered, the Tribe's administrative appeal should not have been decided on the merits, and

its arguments should not now be considered by this Court.

The Court finds Woods' argument unpersuasive. As the Tribe has noted, 25 C.F.R. §2.4 provides that notices of administrative action by the BIA "shall be in writing and shall be given by the official making the decision or taking the action." Here, it is uncontroverted that prior to the filing of the Tribe's appeal, no written notice was provided to the Tribe as to the basis for the approval of the communitization agreements. Therefore, the Tribe's filing of its appeal on August 5, 1981 was not untimely under 25 C.F.R. §2.10. Moreover, Woods has failed to demonstrate that it has been prejudiced by the delay in the filing of the Tribe's appeal. The Court thus concludes that the Tribe's administrative appeal was timely and that the issues raised by the Tribe are properly before it.

III. Tribal Consent

The Tribe argues that because it did not consent to the subject communitization agreements, these agreements do not operate to extend the primary terms of the non-drilling 1976 leases. Both Woods and the federal defendants respond that by virtue of a particular clause of the leases themselves, the Tribe consented to communitization such that the agreements extended the leases' primary terms.

Consideration of this issue must begin with the Mineral Leasing Act, 25 U.S.C. §396 et seq., (the MLA), which governs the leasing of mineral interests on Indian lands. Section 1 of the MLA, 25 U.S.C. §396a, provides that, after May 11, 1938, unallotted lands within Indian reservations

and lands owned by tribes may, with the approval of the Secretary of the Interior, be leased for mining purposes "by authority of the tribal council or other authorized spokesmen for such Indians for terms not to exceed 10 years and as long thereafter as minerals are produced in paying quantities."

The MLA also contains a provision concerning agreements for the cooperative or unit development of oil and gas leases on tribal lands. 25 U.S.C. §396d states, in part:

> In the discretion of [the Secretary of the Interior] . . . any lease for oil and gas issued under the provisions of §396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit, or any other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil and gas from land covered by such lease.

Regulations promulgated pursuant to this provision are specifically directed to communitization agreements such as the ones at bar. 25 C.F.R. 211.21(b) (formerly C.F.R. §171.21(b) states:

> All such leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but *no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.* [emphasis added]

The Tribe's contention is that the underlined language of this regulation provides that a particular communitized agreement cannot be effective until consent is

given by the Tribe to that very agreement. The defendants counter that such consent is expressly granted in Clause 9 of the 1976 leases, which states:

> The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area affecting the lease lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior during the period of supervision.

According to the defendants, the Tribe's agreement to subscribe to "any agreement for the cooperative or unit development of the field or area" constitutes the tribal consent to communitization required by 25 C.F.R. 211.21(b).

The parties' contentions thus raise two issues regarding tribal consent: (1) Did the Tribe's execution of leases containing Clause 9 constitute blanket consent to future communitization agreements? and (2) If Clause 9 did constitute such blanket consent, does the blanket consent embodied by the clause satisfy the consent requirement of 25 C.F.R. 211.21(b)?

A. Order of Remand

Upon consideration of the initial summary judgment motions, the Court found the record insufficient to resolve either issue. As to the first issue, the Court found Clause 9 susceptible to two reasonable interpretations. On the one hand, the Court concluded, Clause 9 might mean that the parties to the lease agree to abide by any

communitization agreement if and when such an agreement is entered into by the majority of the interest owners in the subject sections and is then approved by the Secretary. Under this interpretation, Clause 9 would constitute the Tribe's blanket consent to future communitization agreements. Alternatively, the Court found, Clause 9 might mean that the parties to the lease would first have to agree to a particular communitization agreement themselves. Under this second interpretation, the parties to the lease would then subscribe to and adopt this agreement if and when the agreement that they had reached was adopted by a majority of the working interest owners and approved by the Secretary. Under this interpretation, Clause 9 would not constitute blanket consent to communitization and would require that the parties to the lease specifically agree to a particular communitization agreement before that agreement could become effective. The Court found the record insufficient to determine which interpretation was adopted by the Anadarko office of the BIA and by the parties to the leases.

As to the proper interpretation of the consent requirement of 25 C.F.R. 211.21(b), the Court found the record similarly inconclusive. In their initial summary judgment motions, the parties identified no case law or administrative guidelines construing the regulation. In addition, the evidence presented as to the manner in which the regulation had actually been interpreted by the BIA and the parties to the 1976 leases was sparse.

In light of the insufficiency of the record as to the meaning of both Clause 9 and 25 C.F.R. 211.21(b), the Court determined that the case should be remanded to

the Secretary, so that the following questions could be addressed: (1) what was the Secretary's construction of Clause 9 of the leases at the time they were executed? (2) Were there any written opinions or guidelines as to the construction of Clause 9, and if so, what did they say? (3) What was the Secretary's interpretation of 25 C.F.R. §211.21(b) at the time the leases were executed? (4) Were there any written guidelines or policies regarding the Department's interpretation of 25 C.F.R. §211.21(b)? (5) What was the Secretary's policy with regard to obtaining tribal consent? and (6) Was there any evidence of the parties' construction of Clause 9 and 25 C.F.R. 211.21(b) at the time the leases were executed?

In his response to the Court's Order of Remand, the Secretary explains that the Court's questions were referred to a number of Area Directors in various BIA offices. As to the BIA's construction of Clause 9, the Secretary reports that different responses were received from the different Area Directors. Four Area Directors responded that regardless of whether a lease contained a provision such as Clause 9, tribal consent was always obtained prior to the approval of communitization agreements. Two other Area Directors, including the Anadarko Area Director responded that "their interpretation of Clause 9 was such that by signing the lease containing the language of Clause 9, the Tribe or allotee had already consented to communitization."

The Secretary further reports that the Anadarko Area Director stated that prior to May 1981, it was an office policy to obtain a lessor's consent to a particular communitization agreement "as a means of keeping mineral owners cognizant of development and of the inclusion of

their interest(s) in a unit." However, the Secretary also notes that the Anadarko Area Office reported that, until recently, tribal involvement in mineral leasing had been minimal and therefore "interpretation of the consistency of Section 9 in the lease form and of 25 C.F.R. §211.21(b) had not been a problem."

The Secretary adds that he is unaware of any evidence as to the manner in which Clause 9 was actually interpreted by the parties to the leases here at issue. However, he reports that in April, 1982, the Deputy Assistant Secretary for Indian Affairs issued a memorandum stating that a lessor's consent to a particular communitization agreement was not required if that lessor has previously executed a lease containing "terms such as Clause 9 or similar language."

With regard to the interpretation of 25 C.F.R. 211.21(b), the Secretary's response to the Order of Remand provides little additional information. In particular, the Secretary states that "no written guidelines or policies have been issued pertaining specifically to the Department's interpretation of 25 C.F.R. 211.21(b)." The Secretary adds that he has been unable to locate any evidence as to the manner in which the parties to the leases construed 25 C.F.R. 211.21(b)'s requirement of tribal consent.

Upon consideration of the Secretary's response, the Court finds it inconclusive as to the proper construction of Clause 9 and 25 C.F.R. 211.21(b). It is certainly true that several aspects of the response support the Tribe's contentions. (For example, the fact that, before April, 1982, the Anadarko Office of the BIA required tribal consent to

be obtained before communitization agreements were approved suggests that, at least to some BIA officials, Clause 9 did not constitute blanket consent to future communitization agreements). However, other aspects of the Secretary response support the defendants' contentions. (For example, the statements of the Anadarko office of the BIA that its interpretation is that Clause 9 constitutes blanket consent and that its pre-1982 policy obtaining consent was adopted in order to keep Indian mineral interest owners informed of developments affecting their lands are consistent with the blanket consent interpretation of Clause 9).

In light of the inconclusiveness of the Secretary's response, the Court returns to the language of Clause 9 itself in order to resolve the issue of tribal consent. The Court will consider not only the terms of the clause but the law on pertaining to oil and gas leases generally as well as the provisions of the MLA and the policies and underlying it. Both general principles of oil and gas law and the provisions of the MLA will also be considered in interpreting the requirements of tribal consent under 25 C.F.R. 211.21(b).

B. Language of Clause 9

As to the language of Clause 9, although the Court has previously concluded that there are two reasonable interpretations, the Court now finds the one advanced by the defendants to be more convincing. Most importantly, if the Tribe's interpretation of Clause 9 is followed, then

the term "any agreement" in Clause 9 refers to an agreement for cooperative development between the two parties to the lease. This interpretation is problematic for several reasons. First, it is belied by the nature of cooperative agreements. Such agreements are generally reached by working interest owners in tracts throughout the proposed unit rather than by the lessor and lessee of a particular tract. Moreover, if one follows the Tribe's interpretation, then the parties to the lease are, by virtue of Clause 9, agreeing that when a majority of working interest owners enter into a unit agreement then they (the parties to the lease) will then agree to the unit agreement. Under this interpretation, the first purported agreement (between the parties to the lease) has little practical significance, for without any of the other leases in the unit being involved, there can be no unit agreement.

In contrast, the interpretation of Clause 9 advanced by the defendants avoids these problems. If Clause 9 constitutes blanket consent to future communitization agreements, then the reference to "any agreement for cooperative or unit development" describes what those terms usually refer to: an agreement among mineral interest owners in several different tracts. Moreover, under the defendants' interpretation, Clause 9 does not refer to a nebulous, nonbinding agreement to agree to communitization between two parties who are incapable of putting such an agreement into effect by themselves. Instead, the Clause embodies a binding agreement throughout the life of the lease.

Moreover, the defendants' interpretation is supported by a number of cases that have interpreted similar clauses in oil and gas leases. In fact, clauses providing for

unitization or pooling are frequently included in such leases and have often been upheld over challenges by lessors. *See, e.g., Gorenflo v. Texaco, Inc.*, 566 F.Supp. 722 (M.D. La. 1983); *Heath v. Fellows*, 526 F.Supp. 723 (W.D. Okla. 1981); *Tiller v. Fields*, 301 S.W.2d 185 (Texas Civ. App. 1957); *see generally* 4 Williams, *Oil & Gas Law* §670.1-670.2 at 80-99 (1988); 4 Kuntz, *Law of Oil & Gas* §48.3 at 217-220 (1967).

In fact, in *Phillips Petroleum Company v. Peterson*, 218 F.2d 926 (10th Cir. 1954), the Tenth Circuit expressly held that a unitization clause similar to Clause 9 constituted consent to future unitization. In *Phillips*, a group of lessors entered into various leases containing provisions that granted the lessee, Phillips Petroleum Company, "the right to unitize, pool, or combine all or any part of the above described lands." Some five years later, near the expiration of the primary terms of the leases, a number of lessors refused to consent to a proposed unitization agreement. Phillips then brought a declaratory judgment action in which it sought a determination that the unitization clause required the lessors to enter into the particular agreement at issue. The trial court found that the proposed agreement did not bind the lessors and that, as a result, the leases expired at the end of their primary terms. Among other conclusions, the trial court found that the unitization clauses in the leases were unenforceable because of vagueness and uncertainty. 218 F.2d at 930.

On appeal, the Tenth Circuit reversed, expressly rejecting the trial court's finding as to the vagueness and indefiniteness of the unitization clause. The Tenth Circuit noted that because of governmentally imposed spacing

requirements, lease clauses authorizing unitization had become a practical necessity in the oil and gas industry. 218 F.2d at 931. The court also found the clause's generality warranted by industry practice, explaining:

> Anticipatory provisions in leases for the commitment by the lessee of such leases to the unitization, of necessity must be in general terms. Neither the lessor or the lessee has any way of knowing at the time the lease is taken the facts with respect to which it will be necessary for the lessee to apply his power. It is not practicable for the lessee to await the ascertainment of such facts. He knows from experience that because of the possibility of many changes in ownership of the lessor's interest as time goes on, it may be difficult to effect an agreement for unitization after the lease is taken, if the right to unitize is not included in the lease itself.

218 F.2d at 933. The court found that the relationship between the lessors and the lessee was analogous to that of principal and agent. It concluded that the unitization clauses were sufficient to grant the lessee the authority, as the lessors' agent, to enter into future unitization agreements. *Id.* at 933. The Tenth Circuit has recently reaffirmed the holding of *Phillips*. *See Amoco Production Co. v. Jacobs*, 746 F.2d 1394, 1405-1406 (10th Cir. 1984).

In the instant case, the same considerations discussed in *Phillips* indicate that the parties' execution of leases containing Clause 9 constituted consent to future communitization agreements. As the Secretary has explained in his response to the Order of Remand, communitization has been an established practice on Indian lands for some time and, as a result, leases involving lands within the

Anadarko region of the BIA have contained unitization clauses such as Clause 9 for fifty years. Clause 9's use of the term "*any* agreement" for cooperative or unit development suggests that the lessees here, like the lessees in *Phillips*, were given broad powers to act as the lessors' agent by entering into future communitization agreements such as the ones here at issue.[1]

C. Conflict Between Blanket Consent and the MLA

Throughout its summary judgment briefs, the Tribe has argued that although the blanket consent interpretation

---

[1] This conclusion finds additional support in the Tenth Circuit's recent opinion in *Cotton Petroleum Corp. v. United States Department of the Interior*, 870 F.2d 1515 (10th Cir. 1989). In *Cotton*, the Court considered the Assistant Secretary of the Department of the Interior's reversal of a BIA Area Director's approval of a communitization agreement covering restricted Indian land. The Assistant Secretary had concluded that disapproval of the communitization agreement was in the best interests of the Indian lessors because, through disapproval, the effected lease would expire such that the lessors could obtain a bonus upon renegotiation. The Tenth Circuit concluded that the Assistant Secretary's narrow concern with the bonus to be obtained from renegotiation constituted a failure to consider all the relevant factors concerning the communitization agreement. As a result, it reversed the district court's affirmance of the Assistant Secretary's decision.

Although the tribal consent issue was not expressly discussed by the Tenth Circuit in *Cotton*, it is noteworthy that the subject lease contained a unitization clause identical to Clause 9 of the leases here at issue. The Tenth Circuit characterized the subject clause as "the parties' express promise to abide by any communitization agreement adopted for the unit and approved by the Secretary." *Id.* at 1528. This characterization supports the blanket consent interpretation of Clause 9.

finds some support in the language of Clause 9, it is inconsistent with particular provisions of the MLA and with the general policies underlying it. In particular, the Tribe invokes 25 C.F.R. 211.21(b), 25 U.S.C. 396a, and the policies of maximizing tribal revenues and increasing tribal control over mineral leasing matters. The Court finds none of these arguments persuasive.

The Tribe's argument regarding the purported conflict between the blanket consent interpretation and 25 C.F.R. 211.21(b) is based on the assumption that the consent requirement of the regulation refers to particularized consent to each communitization agreement adopted. As noted above, the regulation does not expressly require such particularized consent, and the Tribe identified no case law or administrative regulations adopting this particularized definition. Moreover, the Tenth Circuit's determination in *Phillips* that a unitization clause in a lease constituted consent to a subsequent communitization agreement indicates that consent to a particular agreement does not inhere in the concept of consent to communitization. Accordingly, the Court finds that the blanket consent interpretation of Clause 9 does not conflict with 25 C.F.R. 211.21(b).

With regard to 25 U.S.C. §396a, the Tribe's contention is that the right to approve mineral leases there conferred on Indian tribes includes the right to approve modifications of leases. Since the subject communitization agreements modify the 1976 leases by extending their primary terms, the Tribe reasons, §396a confers upon the Tribe the right to approve any particular communitization agreement before it becomes effective.

What the Tribe ignores is that, in the instant case, the authorization for the communitization agreement is set forth in the very leases that, pursuant to §396a, the Tribe approved in 1976. To say that the Tribe must consent to a particular modification by means of a communitization agreement when, in the very leases in question, the Tribe has already consented to such modification, would be to ignore the plain language of those leases. This is not required by the MLA.

As to general policies, the Tribe is certainly correct in arguing that the MLA was enacted to maximize tribal revenues as well as to increase the Indians' control over leasing matters and to provide for greater uniformity in leasing practices. See *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555 (10th Cir. 1984), dissenting opinion adopted as the majority opinion, 782 F.2d 855, *cert. den.*, 479 U.S. 970 (1986). However, the Court does not find the blanket consent interpretation of Clause 9 to be inconsistent with these policies.

As to the maximization of lease revenues, the Tribe's blanket consent does not place it at the mercy of its lessees who may then take any action regarding communitization that they wish, even if such actions are detrimental to the economic interests of the Tribe. Instead, as the defendants have noted, even if Clause 9 constitutes the Tribe's blanket consent to communitization, any particular communitization agreement must still be approved by the Secretary of the Interior or one of his delegates. In determining whether to approve a particular communitization agreement, the Secretary and his delegates must act as fiduciaries to the Indian mineral interest owners. They must determine what is in the Indians' best

interest and must seek to maximize the Indians' lease revenues. *See Kenai Oil & Gas, Inc. v. Department of the Interior*, 671 F.2d 383 (10th Cir. 1982). Clause 9's blanket consent does not forfeit the Indians' right to the Secretary's protection.

As to the policy of increasing the Indian's control over mineral leasing, it is undoubtedly true that if Clause 9 did not constitute blanket consent, the Tribe would have more control over the disposition of its mineral leases. However, for several reasons, the Court finds that the blanket consent interpretation of Clause 9 is not so inconsistent with this policy that it should not be adopted. In the first place, as noted above, increasing such control is only one of the policies underlying the MLA. The Court has found no authority for the proposition that this goal should override the many other considerations applicable to this issue. Moreover, blanket consent to communitization by means of a lease clause does not constitute a relinquishment of all control over leasing matters. In particular, an Indian mineral owner remains free to refuse to sign leases containing communitization clauses or seek to have the language of those clauses modified before signing them. In addition, after signing a lease containing a communitization clause, an Indian lessor may object to communitization by urging the Secretary not to approve the proposed communitization agreement because it is not in his or her best interest. Indeed, the Tribe took such action here. Accordingly, the Court finds no fundamental conflict between the blanket consent interpretation of Clause 9 and the policies underlying the MLA.

D. Interpretation of Clause 9 by the BIA and the Parties to the 1976 Leases

The Tribe also contends that the blanket consent interpretation of Clause 9 is controverted by the manner in which the clause was actually interpreted by both the BIA and by the parties to the subject leases. As to the BIA, the Tribe relies primarily on the Secretary's statement (in the response to the Order of Remand) that, prior to 1981, the policy of the Anadarko Area Office of the BIA was to obtain the consent of tribal lessors to communitization agreements before such agreements were approved. As further evidence of this policy, the Tribe refers to certain guidelines for the Anadarko Area office, dated September 28, 1971, which state:

> All agreements for the unit operation of prospective oil and gas areas are to be submitted for approval by the Area Director upon recommendation of the Superintendent. The Bureau considers these agreements to be modifications of the oil and gas leases involved and has always required that such agreements be submitted to competent adult lessors for signature.
>
> If an adult lessor refuses to sign the agreement and the Area Director is of the firm opinion that it should be approved, he may approve the agreement acting under his delegated authority and the provisions of 25 C.F.R. 172.24(c). However with respect to tribal lands; ratification by the tribe is necessary before committing their lands to a unit agreement, in accordance with 25 C.F.R. 171.21(b).

Finally, the Tribe notes that the Assistant Secretary's opinions of June and August 1981 (which conclude that

Clause 9 constitutes blanket consent) indicate that, prior to that time, a contrary understanding prevailed as to the meaning of Clause 9.

Upon careful review of all these materials, the Court concludes that at the time the 1976 leases were entered into, there was not a predominate interpretation of Clause 9 and 25 C.F.R. §211.21(b) requiring consent to particular communitization agreements. Specifically, since Clause 9 expressly requires the lessor to subscribe to and abide by communitization agreements, the Anadarko Area Office's policy of requiring the signature of Indian tribal lessors on communitization agreements is entirely consistent with interpretation of Clause 9 as blanket consent. Even with such blanket consent having been given, it would be entirely reasonable for the Anadarko Office to require lessors to subscribe to the agreements. Moreover, although the Secretary's response to the Order of Remand acknowledges that, prior to 1981, such signatures were required by the Anadarko Office of the BIA, it in no way states that without such signatures a communitization agreement could not be effective. Instead, the Secretary's response indicates that the Anadarko Area BIA always interpreted Clause 9 as blanket consent and had not had the occasion to consider this particular issue until the dispute in the instant case arose in 1981.

For several reasons, the Anadarko Office's guidelines do not alter this conclusion. First, as the federal defendants have noted, such internal guidelines are not binding on the agency and do not have the force and effect of law. *See Schweiker v. Hansen*, 450 U.S. 785, 789-90, *reh'g den.*, 451 U.S. 1032 (1981); *First State Bank of Hudson County v. United States*, 599 F.2d 558 (3d Cir. 1979), *cert.*

den., 444 U.S. 1013 (1980). In addition, as the defendant Woods argues, the guidelines simply do not address the issue of whether a communitization agreement may be effective in the absence of a lessor's signature and tribal ratification if the subject lease contains a provision such as Clause 9.

With regard to the manner in which the parties to the lease actually interpreted Clause 9, the Tribe's contention is that the attempt of Woods and other working interest owners to obtain the tribal consent of the subject communitization agreements in April, 1981 combined with the refusal of the Tribe's representatives to give this consent indicates that the parties to the 1976 leases believed that, in spite of Clause 9, the Tribe's consent to the particular communitization agreements was required. For several reasons, the Court does not agree.

Most importantly, as noted above, even under the blanket consent interpretation of Clause 9, the parties to the 1976 leases still agreed to *subscribe* to communitization agreements if and when those agreements were adopted by a majority of the working interest and approved by the Secretary. Thus, the attempt of the Reading and Bates representatives to obtain the signatures of tribal representatives may be reasonably interpreted as an attempt to obtain the necessary subscriptions, blanket consent having already been obtained by means of the leases. Similarly, the refusal of tribal representatives to subscribe to the subject agreements may be interpreted in conjunction with their contentions that the agreements were not in their best interests such that the Secretary should not approve them. Expressing objections to particular communitization agreements is not inconsistent with

the blanket consent interpretation of Clause 9, for even under this interpretation, Secretarial approval is still required. Accordingly, the Court finds that the record does not establish that the parties to the 1976 leases intended Clause 9 to require particularized tribal consent to each communitization agreement. In the absence of conclusive evidence as to the parties' intent, the more convincing construction of Clause 9 should control.

E. Publication and Retroactive Effect of Blanket Consent interpretation of Clause 9

The Tribe also argues that even if the Court finds the blanket consent interpretation consistent with the MLA and the understanding of the parties to the 1976 leases, this interpretation should not be applied in the instant case because of the manner in which the interpretation was adopted by the BIA. According to the Tribe, the blanket consent interpretation was not expressly adopted by the BIA until June, 1981, when the Acting Deputy Assistant Secretary of the Department of the Interior sent a memorandum to the Anadarko Area Director stating that Clause 9 constituted the requisite consent to communitization. The Tribe contends that the promulgation of this interpretation by means of the June, 1981 memorandum renders the interpretation inapplicable to the 1976 leases for two reasons: (1) because the blanket consent interpretation constitutes a legislative rule that, under 5 U.S.C. §552(a) (1) (D) and §553, cannot be enforced unless it is published; (2) because the blanket consent interpretation constitutes a new interpretation of 25 U.S.C. §396d that should not be applied retroactively.

The Court finds neither argument persuasive. As to the first argument, the fact that the June, 1981 memorandum was not published would be material only if the blanket consent interpretation there set forth constituted an amendment to the applicable regulation, 25 C.F.R 211.21(b). However, as noted above, the blanket consent interpretation is supported by the language of Clause 9 and by established case law. Contrary to the Tribe's suggestions, the June, 1981 memorandum did not set forth a new interpretation of Clause 9 and 25 C.F.R. 211.21(b). For the same reason, interpreting Clause 9 as blanket consent does not constitute retroactive application of a statutory amendment or a new regulation. The law as it stood in 1976 supports the blanket consent interpretation of Clause 9.[2]

F. Conclusion

In conclusion, it should be noted that some deference should be afforded to administrative interpretations of

---

[2] On October 21, 1987, the Department of the Interior published a proposed rule pertaining to communitization agreements on Indian lands. Designated 25 C.F.R. §225.55, the proposed rule, states in part that:

> Where individual or tribal Indian owners have consented in an oil and gas or geothermal contract to include their lands in a cooperative or other development plan, further consent of such owners shall not be required to obtain the approval of a proposed agreement by the Secretary.

52 Fed. Reg. 39, 360 (October 21, 1987).

For the reasons set forth above, the Court finds the promulgation of this proposed rule does not establish that, prior to its adoption, particularized consent to communitization is required. Even in the absence of the proposed rule, there is ample authority to support the blanket consent interpretation of Clause 9.

statutes and regulations, particularly in complex and specialized areas. *See Office of Communication of United Church of Christ v. Federal Communications Commission*, 707 F.2d 1413, 1422 (D.C. Cir. 1983); *Columbia Gas Transmission Corp. v. Federal Power Commission*, 530 F.2d 1056, 1059 (D.C. Cir. 1976). Here as noted above, there have already been several administrative determinations that Clause 9 constitutes blanket consent: the opinion of the Assistant Secretary set forth in the June, 1981 memorandum as well as the two decisions of the Court of Indian Appeals in the instant case. For the reasons set forth above, the Tribe has offered no compelling reason why these interpretations of Clause 9 are incorrect, and the Court finds persuasive the reasoning and conclusions reached at the administrative level. Accordingly, the Court concludes that Clause 9 of the subject leases constituted the Tribe's consent to communitization required by 25 C.F.R. §211.21(b). Therefore, the subject communitization agreements are not invalid because the Tribe did not consent to them.

IV. Secretarial Authority

The Tribe next argues that, in approving the subject communitization agreements, the Area Director exceeded the scope of his lawful authority because he failed to consider all the factors relevant to the approval of the agreements. In particular, the Tribe contends that the Area Director failed to properly consider the impact of approval of the agreements on the Tribe's economic interests. As a result, the Tribe contends, the Area Director's approval of the subject agreements is void, and the non-drilling 1976 leases expired at the end of their primary terms.

In general, as noted above, under 25 U.S.C. §396d, the approval of communitization agreements involving mineral interests in tribal lands is committed to the discretion of the Secretary of the Interior and his delegates. In reviewing actions committed to agency discretion, the Court's function is to determine whether the subject decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. §706(2)(A), *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Kenai*, 671 F.2d at 386. If the record indicates that the administrative decision maker considered all the relevant factors and made no clear error in judgment, the administrative decision should be affirmed. *Overton Park*, 401 U.S. at 416-417; *Kenai*, 671 F.2d at 386.

Review of decisions involving the approval or disapproval of communitization agreements has been discussed by the Tenth Circuit in *Kenai, supra*. There, the Tenth Circuit held that the Secretary's discretion in approving communitization agreements is limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands and as the supervisor and administrator of oil and gas leases on those lands. The Tenth Circuit further stated:

> Acting in the capacity as a trustee, the Secretary and his delegate, the Superintendent of the BIA, must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues. [citations omitted]

671 F.2d at 386. Thus, in the instant case, general principles regarding review of agency decisions must be applied in light of the Secretary of Interior's fiduciary responsibilities to the Indians. As to the approval of the subject communitization agreements, the issue before the Court is whether the Secretary and his delegates considered all the factors relevant to a fiduciary's decision and, in particular, whether the Secretary acted in a manner consistent with his obligation to maximize tribal lease revenues.

The reasons for the Area Director's approval of the subject communitization agreements are set forth in two memoranda written by BIA officials in response to the Board of Indian Appeals' request for supplementation of the record and in the United States' response to this Court's Order of Remand. Essentially the two memoranda submitted to the Board of Indian Appeals state that the Area Director approved the communitization agreements because communitization in general was determined to be in the best economic interest of the Tribe. The memoranda explain that if the communitization agreements were not approved and the 1976 leases allowed to expire, the lessees would have challenged this action in the courts, rendering new leases unmarketable. The memoranda add that a refusal to approve the communitization agreements would involve a risk that the Oklahoma Corporation Commission would de-space the subject tracts from the applicable drilling and spacing units established by the Commission, thus decreasing the net revenues to the Tribe. The memoranda add that communitization in Sections 29 and 32 was geologically justified and would result in a course of long term

development that would be the most favorable for all the parties concerned.

The reasoning underlying the two explanatory memoranda has been discussed by this Court in detail in its Order of Remand. Essentially, the Court there concluded that although disapproval of the communitization agreements might have led to extensive litigation by the losing lessees and to the Corporation Commission's de-spacing of the subject tracts, it was impossible to determine the impact of these events on the economic interests of the Tribe without first knowing the market value and marketability of the new leases that could have been negotiated had the communitization agreements been allowed to expire. In addition, the Court noted that the explanatory memoranda failed to distinguish a disapproval of the subject communitization agreements from a refusal to ever communitize the subject tracts and that the memoranda also failed to consider the Secretary's power to impose restrictions on drilling and production on tribal lands. Finally, the Court noted that the memoranda's discussion of de-spacing did not seem to take into account the fact that the unit wells on both Sections 29 and 32 were located on tribal tracts.

In light of these omissions, the Court remanded the case to the Secretary for further explanation of the reasons underlying the approval of the communitization agreements. In the Order of Remand, the Court directed the Secretary to respond to particular questions propounded by the Court.

In its response to the Court's Order of Remand, the Secretary first acknowledges that, in May 1981, the Acting Area Director of the Anadarko Office of the BIA "did not consider any evidence of the market value and marketability of the new leases." The Secretary explains that because of Clause 9 of the subject leases (discussed above), "there was no reason for requiring another evaluation during the primary term of the lease." As to the basis for the Area Director's conclusion that revenue lost from de-spacing in litigation would exceed any revenue generated from the negotiation of new leases, the Secretary responds that since litigation by the losing lessees would have been likely, "It was the Area's belief that no lessee would be willing to risk leasing any of the tracts that were involved in litigation or were de-spaced. Thus the Area did not believe that the Tribe would receive any increased revenues from re-leasing."

Throughout the response to the Order of Remand, the Secretary stresses that by means of approval of the subject communitization agreements, the Area Director insured that, if oil and gas were discovered in Sections 29 and 32, the Tribe would receive an ongoing income. On the other hand, the Secretary maintains, it was the Area Director's opinion that disapproval would entail "the potential prospect of nondevelopment, a gamble of nonparticipation, several years of litigation and/or a combination of all." Furthermore, according to the Secretary, the Area Director noted before approving the communitization agreements that there was evidence that the 1976 leases were being diligently developed, and this too supported his decision. The Secretary's response further states that the Area Director was concerned that if the

communitization agreements were disapproved, the lessees might choose not to develop the particular tracts on which the unit wells were located.

In conclusion, the Secretary stresses that if the communitization agreements were disapproved, the response of the losing lessees could simply not be predicted with certainty. Thus, the Secretary states, in May 1981, the Acting Area Director could not have conclusively determined whether approval or disapproval would have been more beneficial to the Tribe. According to the Secretary, the Area Director's approval was based on past experience, and the Area Director made his best judgment as to what would be in the best interests of the Tribe. The Secretary concludes, "Through many years experience in the complexities of leasing, the Department has learned that few if any, potential lessees will make a commitment involving a tract claimed by another lessee."

Upon review of the Secretary's response to the Order of Remand, as well as the explanatory memoranda filed during the administrative appeal of this case, it is evident that a justification for approval of the subject communitization agreements can be set forth in terms of the economic benefit of such approval to the Tribe. Nevertheless, the fact that such a justification may and has been set forth does not necessarily mean that the Area Director here considered all the relevant factors and discharged his fiduciary responsibilities.

In particular, it is noteworthy that the primary justification set forth in response to the Order of Remand, (i.e. that if the subject communitization agreements had been disapproved, new leases could not have been negotiated)

is based on an analysis that would be true in every case involving communitization agreements that operate to extend oil and gas leases. The Secretary's position appears to be that potential lessees are so wary of the claims of former lessees that the disapproval of a communitization agreement and a resulting expiration of applicable leases would necessarily mean that new leases could never be negotiated. The Secretary seems to suggest that this would be so regardless of market conditions, the discovery of mineral reserves, or any other factors relating to the recovery of oil and gas. As the Secretary would have it, communitization agreements will always be in the best interests of the Tribe, and a blanket policy of approving them is appropriate.

Yet, elsewhere in the response to the Order of Remand, the Secretary acknowledges that conditions in the Anadarko area in the early 1980s, were somewhat unusual for, as the Area Director reported, "deep gas discovery prompted a short period of astronomical bids on our advertised mineral tracts." A comparison of the lease bonuses obtained by the Tribe on the various tracts located in Section 29 and Section 32 illustrates this point. For each of the 1976 leases here at issue, the Tribe received a bonus of thirty-five dollars per acre and a royalty rate of sixteen and two-thirds percent. In contrast, for the lease of the southwest quarter of Section 32 in February 1980 to Reading and Bates, the Tribe received a bonus of two hundred and thirty-five dollars an acre and a royalty rate of twenty percent. For the lease of the northeast quarter of Section 29, also negotiated in February 1980, the Tribe received a bonus of three hundred and

fifteen dollars per acre and a royalty rate of twenty percent.

In light of such developments in the market for oil and gas, it stands to reason that conclusions reached as to the market value and marketability of leases prior to the boom period might have to be reconsidered for 1980 and 1981. Nevertheless, in concluding that no new leases could be negotiated on the subject tracts, the Area Director seems to have referred to pre-boom conditions. Indeed, the Secretary's first statement in his response to the Order of Remand directly acknowledges this, for he states that once the leases were signed in 1976, there was no reason to require an evaluation of the market value and marketability of the leases in 1981.

The Court finds such reasoning inconsistent with the fiduciary responsibility owed to Indian mineral interest owners by the Secretary and his delegates. A trustee charged with responsibility for trust property is not free to underestimate the value of such property when such under evaluation will damage the interest of his beneficiary. The situation is analogous to that of a trustee charged with the responsibility to sell trust property. If the trustee underestimates the value of that property there is a substantial risk that he will not obtain the best possible price for it. *See, e.g., Terry v. Midwest Refining Co.*, 64 F.2d 428 (10th Cir.); *cert. den.*, 290 U.S. 660 (1933); *Allard v. Pacific National Bank*, 663 P.2d 104, 111 (Wash. 1983). Here, in light of the favorable market conditions existing in May of 1981, the Area Director was not free to conclude, without some consideration of the present market conditions, the new leases would be as difficult to market as they would have been at other times.

The other explanations offered in support of the Area Director's approval of the communitization agreements also indicate that the particular conditions existing in Sections 29 and 32 in May of 1981 were not taken into account. In particular, as noted in the Court's Order of Remand, the discussion of de-spacing concludes that the de-spacing of the subject tracts, in itself would decrease the Tribe's net revenues. This analysis seems to assume that unit wells are located on tracts owned by parties other than the Tribe. However, as noted above, in both Sections 29 and 32, the unit wells are located on tribal tracts (the northeast quarter and the northwest quarter, respectively). Thus, the absence of a communitization agreement, standing alone, would increase the Tribe's net revenues, since the production from the unit wells would not be allocated among other tracts not owned by the Tribe.

Of course, it may be, as the Secretary suggests in his response to the Order of Remand, that the disapproval of the subject communitization agreements would have resulted in the refusal of the lessees to further develop the leases on which the unit wells were located. However, a thorough assessment of the probability of such a result would require consideration of the particular unit wells at issue. Here, in Section 29, drilling of the unit well began in the northeast quarter in November of 1980. In May of 1981 drilling of the well had progressed to a depth of fifteen thousand and seventy-three feet. In Section 32, drilling of the unit well began in April of 1981 and by May 8, 1981 such drilling had progressed to a depth of sixteen hundred and thirty-four feet. Certainly, the progress and the prospects of these unit wells would

be relevant to a determination of how likely it would be that the lessees would cease development of these wells if other leases in Section 29 and 32 were terminated by disapproval of the subject communitization agreements. However, in considering only the fact that such cessation of operations was a possibility that had occurred in other cases, the Area Director seems not to have considered how the actual drilling of the unit wells in Sections 29 and 32 affected his general analysis.

Moreover, as the Tribe has observed, there is no indication that the Area Director considered his own regulatory power over oil and gas leases on tribal lands in his analysis of what would be in the best interests of the Tribe. For example, under the applicable regulations, the Secretary is authorized to approve or disapprove the commencement of drilling, the suspension of drilling, and the abandonment of wells that have been drilled. *See* 43 C.F.R. § 3162.3-1, 43 C.F.R. § 3162.2, 43 C.F.R. § 3162.3-4. The Secretary may also impose sanctions on lessees that do not comply with the applicable regulations. *See* 43 C.F.R. § 3163.1, 43 C.F.R. § 3163.2.

As the Tribe notes, these regulatory powers gave the Area Director a number of options as he considered whether or not to approve the subject communitization agreements in May of 1981. First, instead of merely approving or disapproving the communitization agreements, the Area Director could have made his approval conditional on renegotiation of the leases on terms more favorable to the Tribe. In addition, if a modification of the 1976 leases or a negotiation of new leases could not have been achieved, the Area Director could, pursuant to 25 U.S.C. § 396d, communitize the subject tracts as unleased

lands so that they could participate in any production from the unit well until new leases could be negotiated. In addition, if the anticipated cessation of drilling operations occurred in response to disapproval of the communitization agreements, the Area Director could have taken certain punitive measures against the lessees such that the cessation of drilling would be discouraged.

The explanatory memoranda and the Secretary's response to the Order of Remand indicate that the Area Director considered none of these options. Indeed, the response to the Order of Remand expressly states that such options were *not* considered because there were factors beyond the Area Director's control that rendered the Area Director powerless to prevent the decrease in tribal revenues that would result if the communitization agreements were disapproved.

To be sure, if the Area Director was indeed powerless to prevent the decrease in tribal revenues that would result from disapproval of the communitization agreements, one could not conclude that the Area Director breached his fiduciary obligations in approving the agreements. However, the Area Director's assessment of his own powerlessness was not based on an evaluation of the conditions existing in Sections 29 and 32 in 1981. His approach was analogous to that of an outfielder who, after chasing a long fly ball to the fence, fails to jump for the ball because, in a previous game, the wind blew a similar hit out of the park. If the outfielder's conclusion about the wind was not based on an assessment of the conditions prevailing on the day of the game, one would be justified in concluding that, in failing to jump for the ball, he failed to perform as he should have. Similarly,

because he did not consider contemporary conditions in Sections 29 and 32, the Court finds the Area Director's conclusion that there was nothing he could do to protect the Tribe's economic interests if the communitization agreements were disapproved to be inconsistent with his fiduciary obligations to the Tribe.

The Area Director's actions are similar to those involved in *McClanahan v. Hodel*, Case No. 83-161-M (Civil), slip. op. (D. N.M. August 14, 1987). In *McClanahan*, a group of Navaho Indians holding allotted tracts entered into uranium mining leases with Mobil Oil Company in 1972. The leases provided for primary terms of ten years and for automatic secondary terms if Mobil obtained commercial production by the end of the primary terms. If commercial production was not achieved, the leases would be put up for competitive bidding at the end of the primary terms.

By 1977, Mobil had commenced development of the leases, and it appeared that they would be tremendously profitable. However, fearing that it would not be able to reach commercial production by the end of the primary terms of the leases, Mobil sought to renegotiate them. Mobil proposed an amendment to the leases that would extend their primary terms for two years and would provide certain increased benefits to the Indian lessors, including an increased royalty rate, a bonus, and an increased rental amount. Upon review of Mobil's proposal, the Commissioner of the BIA suggested that new leases be negotiated for ten years and that the new leases contain a clause that would allow the royalty rate to be reviewed two years after the commencement of commercial production and every five years thereafter. The local

Area Director then concluded that the same bonus and increased rents and royalty rates that had been suggested for the two-year lease extensions should be included in the new ten-year leases. Although not all of the Indian lessors consented to these new terms, the Assistant Secretary approved the new leases.

Upon review of the Assistant Secretary's approval, the Court in *McClanahan* concluded that the approval was invalid for two reasons: (1) because the Secretary lacked the statutory authority to approve the leases without the unanimous consent of the Indian lessors; and (2) because, in approving the leases, the Secretary breached his trust responsibilities to the Indian mineral interest owners.

As to the latter conclusion, the Court found that in light of the tremendous profits that Mobil seemed likely to achieve upon developing the subject tracts, some "hard bargaining" with Mobil was called for on the part of those seeking to protect the interests of the Indian lessors. *Id.* at 17. The Court found that it was a clear breach of the trust responsibilities of the Secretary and his delegates for them to refuse "to exact of Mobil one jot more than Mobil originally offered." *Id.* at 17. In discussing several specific instances in which the Secretary and his delegates failed to meet their trust obligations, the court noted that the BIA had repeatedly refused certain lessors' requests that an economic analysis of the subject tracts be performed. The court referred to statements in the BIA's own manual that "[a] well - supported economic appraisal is essential to meaningful evaluation of any transaction involving Indian lands." *Id.* at 18.

The Court finds the reasoning of *McClanahan* applicable in the instant case. Here, in the Anadarko Basin in 1981, the economic climate was extremely favorable for those leasing mineral interests and leases were being negotiated on terms considerably more favorable to lessors than they had been in previous years. A fiduciary seeking to protect the interests of such Indian lessors should have taken measures to reap the benefits of this economically favorable climate, or, at least, explored what measures were possible. However, in approving the subject communitization agreements, the Acting Area Director based his analysis on general considerations and made an inadequate study of contemporary conditions in the particular sections involved. In addition, instead of attempting to employ his regulatory powers to protect the Tribe's interests, the Area Director concluded, without exploring any options, that if he disapproved the subject communitization agreements, there was nothing he could do to protect tribal revenues from adverse reactions by the losing lessees. Had this conclusion been based on the study of conditions prevailing at that time, this conclusion might be supportable. However, the conclusion was not based on such a study.

Accordingly, the Court finds that, in approving the subject communitization agreements, the Area Director breached his trust responsibility to the Tribe under the MLA. Therefore, the subject communitization agreements do not extend the non-drilling 1976 leases, and these leases thus expired at the end of their primary terms.[3]

---

[3] In the Court's opinion, this finding is not inconsistent with the Tenth Circuit's recent opinion in *Cotton Petroleum Corp.*,

V. Conflict Between 1976 Leases and the Mineral Leasing Act

The Tribe further argues that all of the 1976 leases expired at the end of their primary terms because certain provisions of the leases purporting to extend them beyond these terms violate the MLA. In response, the

---

supra. In *Cotton*, the Tenth Circuit found that, in focusing exclusively on the economic benefit that would be obtained by an Indian lessor if a communitization agreement were disapproved such that a lease could be renegotiated, the Assistant Secretary failed to consider all the relevant factors under *Kenai* and the BIA guidelines issued pursuant to that decision. In particular, the Court found that the Assistant Secretary did not analyze and discuss "the long term economic effects" of the agreement, "the engineering and technical aspects of the unit and the communitization agreement covering it," and "any obligation to approve the agreement there may be by virtue of the express language contained in paragraph 11 of the Rose lease [the counterpart of Clause 9]." 870 F.2d at 1526.

In the case at bar, the Court's conclusion is that the Area Director breached his fiduciary duty to the Tribe by failing to consider any information as to the marketability of the subject leases. Although *Cotton* clearly indicates that an exclusive concern with this issue is not proper in evaluating a communitization agreement, it does not state that consideration of the marketability issue is improper. Indeed, under this Court's interpretation, *Cotton* reaffirms *Kenai*'s conclusion that the economic impact of the approval or disapproval of a particular communitization agreement is one of the relevant factors that must be considered by the Secretary and his delegates in the exercise of their fiduciary responsibilities to the Indians. Since this factor was not properly considered by the Area Director in the instant case, the Tenth Circuit's analysis in *Cotton*, does not controvert the conclusion that the approval of the subject agreements was inconsistent with the Area Director's fiduciary duties.

federal defendants and Woods contend that since this matter was not raised by the Tribe during its administrative appeals, it can not now be raised before this Court. Accordingly, before considering the merits of the Tribe's argument, the Court must first determine whether this matter is properly before it.

As the defendants have argued, it is well established that a reviewing cannot entertain questions that have not previously been raised before the agency. *Wilson v. Hodel*, 758 F.2d 1369, 1373 (10th Cir. 1985); *Kenai*, 671 F.2d at 388; *Beatrice Food Co. v. Federal Trade Commission*, 540 F.2d 303, 313 (6th Cir. 1981). One exception to this rule concerns matters of statutory interpretation. *Frontier Airlines v. Civil Aeronautics Board*, 621 F.2d 369, 371 (10th Cir. 1980).

In the case at bar, it is uncontroverted that the issue regarding the purported conflict between the MLA and the 1976 leases was not raised during any of the administrative proceedings. Nevertheless, the gist of the Tribe's argument on this issue involves the interpretation of certain provisions of the MLA. Accordingly, the Court finds that this issue is properly before it.

The Tribe's argument is based on that part of the MLA that concerns the duration of leases of unallotted lands, 25 U.S.C. § 396a, which states:

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed 10 years and as

> long thereafter as minerals are produced in paying quantities.

The Tribe contrasts this provision with paragraph 1 of the subject leases, which states that the leases are:

> . . . for the term of 5 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

Paragraph 1 further states:

> If the lessees shall commence to drill a well within the term of this lease, the lessee shall have the right to drill such well to completion with reasonable diligence and if oil or gas or either of them be found in paying quantities this lease shall continue and be in force with like effect as if such well had been completed within the term of years herein first mentioned.

According to the Tribe, 25 U.S.C. 396a authorizes leases of unallotted lands only for a definite term of years that does not exceed ten years, and these leases may be extended only by the the production of minerals in paying quantities during their primary terms. Since, under paragraph 1, the 1976 leases may be extended merely by drilling without the achievement of production, the Tribe argues, this provision of the leases directly violates 25 U.S.C. § 396a.

In support of this argument, the Tribe invokes the legislative history of the MLA. It contends that the durational restrictions set forth in 25 U.S.C. § 396a are based on similar durational restrictions in an earlier act passed in 1924 (then designated 25 U.S.C. § 398). The Tribe cites portions of legislative history of the 1924 act that indicate

that one purpose of the act was to conform the terms of tribal leases to the terms of leases of private lands. According to the Tribe, in 1924, the prevailing interpretative rule was that "the habendum clause controls the duration of the lease to the exclusion of conflicting clauses governing drilling obligations." The Tribe contends that it was with this understanding that Congress enacted 25 U.S.C. § 396a and that, as a result, the drilling clauses of the subject leases are in direct conflict with this statute.

For several reasons, the Court does not find the Tribe's argument persuasive. In the first place, because of the manner in which the subject leases were developed, it does not appear that there is any conflict between the subject leases and the express terms of 25 U.S.C. § 396a. Specifically, all of the subject leases were for primary terms of five years. Although production was not achieved within that five-year period, it was achieved, in both sections, in less than ten years after the leases were initially approved. Accordingly, if 25 U.S.C. § 396a is read simply to bar any leases that remain unproductive for more than ten years, these leases are not barred by the statute. Production was achieved prior to the maximum period.

Moreover, the Tribe's contention that 25 U.S.C. § 396a should be read more narrowly to preclude an extension of a lease's primary term (even if that primary term is less than 10 years) unless there is production within that primary term is not supported by the applicable law. In particular, the Tribe's account of the prevailing interpretative rule in 1924 as to conflicts between habendum and drilling clauses in oil and gas leases is misleading.

As one scholar has noted, for a number of years, courts have taken "different views on the manner of interpreting apparently conflicting habendum and drilling clauses. Some have held, as the Tribe now argues, that habendum clauses alone controls the terms of a lease and that "the drilling clause is only designed to control rights during the fixed term and not thereafter." *Kuntz, The Law of Oil and Gas* § 26.13 at 411 (1967). These courts conclude that, in spite of the provisions of a drilling clause, a lease "will terminate according to the habendum clause if the lease is not producing at the end of the primary term." *Id.* at 411; *see* e.g. *Stetson v. Orland Oil Syndicate*, 108 P.2d 463 (Cal. App. 1940); *Humphreys v. Fletcher*, 204 P. 70 (N.M. 1922). In contrast, a number of other courts have concluded that a lease containing a "commence drilling clause" (such as paragraph 1 in the leases here at issue) will not terminate at the end of the primary term set forth in the habendum clause if drilling operations have been commenced in the primary term. *Kuntz*, § 26.13 at 409; *see e.g. Lester v. Mid-South Oil Co.*, 296 F.661 (6th Cir. 1924); *Consolidated Gas Co. v. Rieckhoff*, 151 P.2d 588 (Mont. 1944); *Simons v. McDaniel*, 7 P.2d 419 (Okla. 1932); *De Flores v. Smith*, 236 S.W. 505 (Tex. Civ. App. 1922); *Texas Co. v. Curry*, 229 S.W. 643 (Tex. Civ. App. 1921).

As these cases demonstrate, as of 1924 (the determinative date under the Tribe's argument) each interpretive approach had been adopted by a number of courts. Contrary to the Tribe's suggestions, the provisions of the MLA do not indicate the approach to be followed in interpreting a lease of unallotted lands. 25 U.S.C. § 396a simply establishes the maximum primary term that may

be set forth in a habendum clause of a lease. It does not indicate how this clause should be interpreted in relation to the lease's other clauses, such as the commence drilling clauses here at issue.

However, in *Moncrief v. Pasotex Products Co.*, 280 F.2d 235 (10th Cir. 1960), *cert. den.*, 364 U.S. 912 (1960), in interpreting the provisions of an oil and gas lease on Indian land in Oklahoma, the Tenth Circuit concluded that the approach taken in the Oklahoma, Texas and Montana decisions cited above should be applied. In *Moncrief*, the lessee commenced the drilling of a well during the leases' primary term but did not achieve production by the end of that term. The Court found that "[t]he lessee's right to commence a well during the [leases'] primary term carries with it, by necessary legal implication, the right to complete the well after expiration of the primary term unless negatived by contract terms or loss by abandonment." 280 F.2d at 237. The court relied on *Simons v. McDaniel, supra*, in which the Oklahoma Supreme Court found that a commence drilling clause was sufficient to extend a lease on which drilling had commenced but on which no production had been achieved by the end of the primary term set forth in the habendum clause. 7 P.2d at 420-422.

The Court finds *Moncrief* directly applicable to the instant case. Since the Tenth Circuit there concluded that, standing alone, the right to commence the drilling of a well within a lease's primary term implicitly includes the right to complete the well after the primary term has expired, there is all the more reason to conclude that the lessee has such a right when the lease in question expressly grants that right by means of a commence

drilling clause. Accordingly, the Court concludes that the commence drilling clauses of the subject leases operate to extend those leases if drilling is commenced during the primary term set forth in their habendum clauses. The Tribe's Cross-Motion for Partial Summary Judgment on the Issue of Whether the Woods' Leases Violate the Mineral Leasing Act is therefore denied.

VI. Amendment of Leases by Communitization Agreements

The Tribe next argues that the subject communitization agreements amended all of the 1976 leases such that those leases expired at the end of their primary terms in May of 1981. It relies on the part of the communitization agreements that states:

> EXCEPT as herein modified and changed the oil and gas leases described on Exhibit A shall remain in full force and effect as originally drawn.
>
> It is further agreed that the actual drilling, completion, continued operation or production of a well or wells for communitized substances on the communitized area shall be construed and considered as the actual drilling, completion, continued operation or production from each and all of the lands within and comprising said communitized area. (Actual drilling is defined: If the lessees shall commence actual drilling with a rig designed to go to the total proposed depth and such drilling shall commence by midnight on the last day of the primary term of this lease and shall continue until the well is fully completed to production or

> abandoned, the Lessees shall have the right to drill such well to completion with reasonable diligence and if oil or gas, or either of them, are found in paying quantities, this lease shall continue and be in force with like effect as if such well had been completed within the term of years herein first mentioned.) *All Trust or Restricted leases committed by this agreement are hereby amended to provide that any non-producing zones shall be released at the end of the primary term of said leases.* [Emphasis added]

The Tribe contends that, because of the underlined language, the agreements amended the 1976 leases such that their primary terms could be extended only by production within those terms. Thus, according to the Tribe, this language renders inoperative the drilling clauses of the 1976 leases.

Both the federal defendants and the defendant Woods note that this argument should not be considered by the Court because it was not raised at the administrative level. The Court agrees. In this instance, in contrast to the Tribe's argument regarding the MLA, the Tribe does not raise a question of statutory interpretation, and none of the other exceptions to the requirement of exhaustion of administrative remedies is applicable. The Tribe could have raised this issue in its administrative appeal of the approval of the communitization agreements but did not. As a result, the Court finds that this matter is not properly before it.

Moreover, even if the matter had been properly raised at the administrative level, the Court finds the

arguments presented by the Tribe unpersuasive. In particular, immediately prior to the section of the communitization agreement emphasized by the Tribe, the agreements set forth a definition of "actual drilling" that mirrors the drilling clauses in the 1976 leases. The Tribe's interpretation of the agreements seems to be that the actual drilling definition is rendered inoperative by the following sentence regarding the amendment of leases. This is not a reasonable interpretation of the communitization agreements. The only reasonable interpretation of this part of the agreements is that by the term "nonproducing zones," the communitization agreements refer the zones in which there has been no actual drilling. This interpretation renders the terms of the communitization agreements consistent with one another and harmonizes the provisions of the communitization agreements with the 1976 leases.

Accordingly, the Tribe's Cross Motion for Summary Judgment on the Issue of Whether the Woods' Leases Were Amended by the Communitization Agreements to Condition Extension Beyond Their Primary Terms on Production Rather Than Drilling is denied.

VII. Conclusion

In summary, as set forth above, the Court rules as follows: (1) the Tribe's Motion for Partial Summary Judgment on the Tribal Consent and Secretarial Authority Issues is granted in part and denied in part; (2) the Tribe's Cross-Motion for Partial Summary Judgment on the Issue of Whether the Woods' Leases Violate the Indian Mineral Leasing Act of 1938 is denied; (3) the Tribe's Cross-Motion for Summary Judgment on the Issue of Whether

the Woods' Leases Were Amended to Condition Extension Beyond Their Primary Terms on Production Rather Than Drilling is denied; (4) the defendant Woods' Motion for Partial Summary Judgment is granted in part and denied in part; (5) the federal defendants' Motion for Summary Judgment is granted in part and denied in part.

As explained above, the result of these rulings is that the three leases on which no drilling occurred during their primary terms, numbers 14-20-205-6894, 14-20-205-6895, and 14-20-205-6897 expired on May 10, 1981, at the end of their primary terms. As of that date, the Tribe, rather than Woods and Reading and Bates, is the rightful owner of all of the working interest (as well as the royalty interest) in the subject tracts. Since production has been achieved on the subject tracts, the Court's conclusion as to the expiration of the 1976 non-drilling leases entitles the Tribe to certain revenues attributable to the subject tracts after May 10, 1981.

However, in light of the Tenth Circuit's recent decision in *Cotton Petroleum, supra*, and the complexity of the issues here involved, the Court finds pursuant to 28 U.S.C. § 1292(b) that this order involves controlling questions of law as to which there is substantial ground for difference of opinion. Moreover, an immediate appeal from this order may ultimately advance the termination of this litigation. Accordingly, within 10 days of the date of the entry of this order the parties may apply to the Court of Appeals for the Tenth Circuit to permit an immediate appeal of this order. If the parties do not appeal the order, the Court will then request procedural recommendations regarding the manner in which the amounts owed to the Tribe should be determined.

It is so ordered this 26th day of May, 1989.

/s/ Wayne Alley
WAYNE E. ALLEY
United States District Judge

Entered in judgment docket
5-26-1989

STATUTORY AND REGULATORY PROVISIONS

25 U.S.C. § 396a. Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

(May 11, 1938, c. 198, § 1, 52 Stat. 347.)

---

25 C.F.R. § 171.10 Term of leases (1976).

Mining leases may be made for a specified term not to exceed ten years from the date of approval by the Secretary of the Interior, or his authorized representative, and as much longer as the substances specified in the lease are produced in paying quantities.

PROPOSED REGULATION

56 Fed. Reg. 58740-41, November 21, 1991

(25 C.F.R. 211.27(b) (1992). Duration of leases.)

* * *

(b) An oil and gas or geothermal resource lease which stipulates that it shall continue in full force and effect beyond the expiration of the primary term if drilling operations have commenced during the primary term ("commencement clause") shall be valid and shall hold the lease beyond the primary term if the lessee has commenced actual drilling by midnight of the last day of the primary term of the lease with a rig designed to reach the total proposed depth, and drilling is continued with reasonable diligence until the well is completed to production or abandoned. Drilling which meets the requirements of this section and occurs within a unit or communitization agreement to which the lease is communitized shall be considered as if it occurs on the leasehold itself. If there is a conflict between the commencement clause and the habendum clause of a lease, the commencement clause will control.

Form E157 (July 1964)

CONTRACT NO. 14-20-205-6896
May 18 1976

UNITED STATES
AA0-71 DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

OIL AND GAS MINING LEASE –
TRIBAL INDIAN LANDS

THIS INDENTURE OF LEASE, made and entered into in quadruplicate this 2nd day of April, 1976, by and between Cheyenne-Arapaho Tribal Land

(Red Moon School Reserve)

of Custer County, State of Oklahoma, for and on behalf of the Cheyenne-Arapaho Tribe of Indians, lessor, and Woods Petroleum Corporation

3555 N. W. 58th Street

of Oklahoma City, State of Oklahoma, lessee, WITNESSETH:

1. Lessor, in consideration of a cash bonus of $5721.60, paid to the Bureau of Indian Affairs, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits including helium gas, carbon dioxide gas, and sulphur gas in or under the following-described tracts of land situated in the county of Custer, State of Oklahoma, and more particularly described as follows:

Township 14 North, Range 20 West

Section 32: NW/4

containing 160 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 5 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

If the lessee shall commence to drill a well within the term of this lease, the lessee shall have the right to drill such well to completion with reasonable diligence and if oil or gas, or either of them, be found in paying quantities, this lease shall continue and be in force with like effect as if such well had been completed within the term of years herein first mentioned.

2. The term "oil and gas supervisor" as employed herein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term "superintendent" as used herein shall refer to the superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leased. Helium gas, carbon dioxide gas, sulphur gas, and all other natural gases are included under the term "gas" as used in this lease.

3. In consideration of the foregoing, the lessee hereby agrees:

(*a*) **Bond.** – To furnish such bond as may be required by the regulations of the Secretary of the Interior, with satisfactory surety, or United States bonds as surety therefor, conditioned upon compliance with the terms of this lease.

(*b*) **Wells.** – (1) To drill and produce all wells necessary to offset or protect the leased land from drainage or in lieu thereof, to compensate the lessor in full each month for the estimated loss of royalty through drainage: *Provided,* That during the period of supervision by the Secretary of the Interior, the necessity for offset wells shall be determined by the oil and gas supervisor and payment in lieu of drilling and production shall be with the consent of, and in an amount determined by the Secretary of the Interior; (2) at the election of the lessee to drill and produce other wells: *Provided,* That the right to drill and produce such other wells shall be subject to any system of well spacing or production allotments authorized and approved under applicable law or regulations, approved by the Secretary of the Interior and affecting the field or area in which the leased lands are situated; and (3) if the lessee elects not to drill and produce such other wells for any period the Secretary of the Interior may, within 10 days after due notice in writing, either require the drilling and production of such wells to the number necessary, in his opinion, to insure reasonable diligence in the development and operation of the property, or may in lieu of such additional diligent drilling and production require the payment on and after the first anniversary date of this lease of not to exceed $1 per acre per annum, which sum shall be in addition to any rental or royalty hereinafter specified.

(c) **Rental and royalty.** – To pay, beginning with the date of approval of the lease by the Secretary of the Interior or his duly authorized representative, a rental of $1.25 per acre per annum in advance during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty of 16⅔ percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil or gas shall be royalty free. During the period of supervision, "value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor. The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value. When paid in value, such royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which produced; when royalty on oil produced is paid in kind, such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced without

cost to the lessor unless otherwise agreed to by the parties thereto, at such time as may be required by the lessor: *Provided,* That the lessee shall not be required to hold such royalty oil in storage longer than 30 days after the end of the calendar month in which said oil is produced: *And provided further,* That the lessee shall be in no manner responsible or held liable for loss or destruction of such oil in storage caused by acts of God. All rental and royalty payments, except as provided in section 4 (*c*) shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day the check or draft is issued, to the Bureau of Indian Affairs. All such rental and royalty payments shall be mailed to the oil and gas supervisor for transmittal to the payee designated by the Area Director. It is understood that in determining the value for royalty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for the cost of manufacture shall be made, such allowance to be two-thirds of the value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lessee or on his own initiative, and that royalty will be computed on the value of gas or casinghead gas, or on the products thereof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is the greater.

(*d*) **Monthly statements.** – To furnish to the oil and gas supervisor monthly statements in detail in such form as may be prescribed by the Secretary of the Interior, showing the amount, quality, and value of all oil, gas, natural gasoline, or other hydrocarbon substances produced and saved during the preceding calendar month as a basis upon which to compute, for the treasurer of said

tribe or the superintendent, the royalty due the lessor. The leased premises and all wells, producing operations, improvements, machinery, and fixtures thereon and connected therewith and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized representative of the Secretary of the Interior.

(*e*) **Log of well.** – To keep a log in the form prescribed by the Secretary of the Interior of all the wells drilled by the lessee showing the strata and character of the formations passed through by the drill, which log or a copy thereof shall be furnished to the oil and gas supervisor.

(*f*) **Diligence, prevention of waste.** – To exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby, while such products can be secured in paying quantities; to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the productive sands or oil or gas-bearing strata to the destruction or injury of the oil or gas deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; to plug securely all wells before abandoning the same and to effectually shut off all water from the oil or gas-bearing strata; not to drill any well within 200 feet of any house or barn now on the premises without the lessor's written consent; to carry out at the expense of the lessee all reasonable orders and requirements of the oil and gas supervisor relative to prevention of waste, and

preservation of the property and the health and safety of workmen; to bury all pipe lines crossing tillable lands below plow depth unless other arrangements therefor are made with the superintendent; to pay the lessor all damages to crops, buildings, and other improvements of the lessor occasioned by the lessee's operations: *Provided,* That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

(*g*) **Regulations.** – To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including 30 CFR 221: *Provided,* That no regulation hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease.

(*h*) **Assignment of lease.** – Not to assign this lease or any interest therein by an operating agreement or otherwise nor to sublet any portion of the leased premises before restrictions are removed, except with the approval of the Secretary of the Interior. If this lease is divided by the assignment of an entire interest in any part of it, each part shall be considered a separate lease under all the terms and conditions of the original lease.

4. The lessor expressly reserves:

(*a*) **Disposition of surface.** – The right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, such disposition to be subject at all times to the right of the lessee herein to the use of so much of said

surface as is necessary in the extraction and removal of the oil and gas from the land herein described.

(*b*) **Use of gas.** – The right to use sufficient gas free of charge for any school or other buildings belonging to the tribe on said lands by making connection at its own expense with the well or wells thereon, the use of such gas to be at the lessor's risk at all times.

(*c*) **Royalty in kind.** – The right to elect on 30 days' written notice to take lessor's royalty in kind.

5. **Surrender and termination.** – The lessee shall have the right at any time during the term hereof to surrender and terminate this lease or any part thereof upon the payment of the sum of one dollar and all rentals, royalties, and other obligations due and payable to the lessor; and in the event restrictions have not been removed, upon a showing satisfactory to the Secretary of the Interior that full provision has been made for conservation and protection of the property and the proper abandonment of all wells drilled on the portion of the lease surrendered, the lease to continue in full force and effect as to the lands not so surrendered. If this lease has been recorded lessee shall file a recorded release with his application to the superintendent for termination of this lease.

6. **Cancelation and forfeiture.** – When, in the opinion of the Secretary of the Interior and the Tribal Council, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior shall have the right at any time after 30 days' notice to the lessee, specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days of

receipt of notice, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land: *Provided*. That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee.

7. **Removal of buildings, improvements, and equipment.** – Lessee shall be the owner of and shall have the right to remove from the leased premises, within 90 days after termination of this lease, any and all buildings, structures, casing, material, and/or equipment placed thereon for the purpose of development and operation hereunder, save and except casing in wells and other material, equipment, and structures necessary for the continued operation of wells producing or capable of being produced in paying quantities as determined by the Secretary of the Interior, on said leased land at the time of surrender of this lease or termination thereof; and except as otherwise provided herein, all casing in wells, material, structures, and equipment shall be and become the property of the lessor.

8. **Drilling and producing restrictions.** – It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws or regulations by competent Federal or

State authorities or lawful agreements among operators regulating either drilling or production, or both.

9. **Unit operation.** – The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

10. Conservation. – The lessee in consideration of the rights herein granted agrees to abide by the provisions of any act of Congress, or any order or regulation prescribed pursuant thereto, relating to the conservation, production, or marketing of oil, gas, or other hydrocarbon substances.

11. Heirs and successors in interest. – It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors of, or assigns of the respective parties hereto.

12. No lease, assignment thereof, or interest therein, will be approved to any employee or employees of the United States Government whether connected with the Indian Service or otherwise and no employee of the Interior Department shall be permitted to acquire any interest in any mineral lease covering restricted Indian lands by ownership of stock in corporations having such leases or in any other manner.

COUNTY OF OKLAHOMA *ss*:

Before me, a notary public, on this 21st day of April, 1976, personally appeared Larry L. Miles, as Vice President of Woods Petroleum Corporation, to me known to be the identical person(s) who executed the within and foregoing lease, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

/s/ Verilea E. Williams,
Verilea Williams, Notary Public

My commission expires June 14, 1976

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned:

* * *

/s/ Howard Goodbear [SEAL]

/s/ Ralph Beard [SEAL]

/s/ Larry L. Miles [SEAL]
Larry L. Miles, Vice President

WOODS PETROLEUM
CORPORATION

Attest: /s/ Leroy Ussery
Leroy Ussery,
Secretary

ACKNOWLEDGMENT OF LESSOR

STATE OF OKLAHOMA)
) *ss:*
COUNTY OF CANADIAN)

Before me, a notary public, on this 1st day of May 1976, personally appeared Howard Goodbear and Ralph Beard to me known to be the identical persons who executed the within and foregoing lease, and acknowledged to me that they executed the same at their free and voluntary act and deed for the uses and purposes therein set forth.

/s/ John E. Donnell
John E. Donnell,
Notary public

My commission expires April 12, 1980

APPROVED:

Concho Agency, Concho, Okla.
Approved under authority delegated
by 230
DM 1, 39 F.R. 32166; 10 BIAM 3, 40 F.R.
17046 and 10 BIAM 7, 36 F.R. 17667.

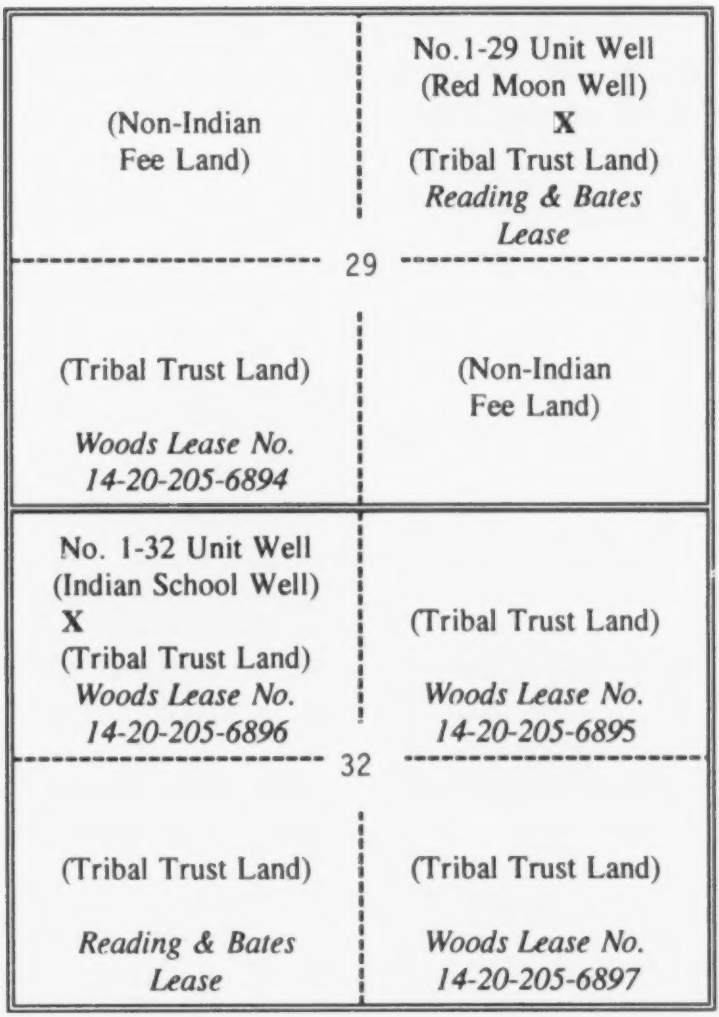
MAY 10, 1976
Date

/s/ Edward T. [illegible]
Acting Superintendent

Communitized/Production Units

Sections 29 and 32

N



X = Location of Unit Well